THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE ALABAMA MIDLAND RAILWAY COMPANY
ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR APPELLANT.

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Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

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I.

STATEMENT OF CASE.

This is a proceeding in equity under section 16 of the "Act to regulate commerce" for the enforcement of an order of the appellant, The Interstate Commerce Commission, against The Alabama Midland Railway Company, The Georgia Central Railway Company, and a number of other carriers, connections of and forming through lines with those two railways. In the case before the Commission in which the order in question was made, the complaint against these carriers was filed by the Board of Trade of Troy, Ala., and was, in substance, that

their rates to Troy from certain points were unjustly discriminatory against Troy and unduly preferential to Montgomery, Ala., and that their rates from certain other points were unjustly discriminatory against Troy and unduly preferential to Montgomery, Ala., and Columbus, Ga.

These three cities, Troy, Montgomery, and Columbus, compete for business in territory adjacent to Troy. Troy is situated at the intersection of the roads of the Alabama Midland and Georgia Central companies; Montgomery is situated on the Alabama River at the terminus of the Alabama Midland Road, 52 miles northwest from Troy, and Columbus on the Georgia Central Road where it crosses the Chattahoochee River, about 80 miles northeast from Troy.

The complaint of the Board of Trade of Troy contained (as set forth in the report of the Commission, Record, pp. 52–53) six charges or specifications of violations of the act to regulate commerce, as follows:

"1. That the 'Alabama Midland and Georgia Central and their connections unjustly discriminate against Troy and in favor of Montgomery' in charging and collecting $3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields, and only $3 per ton on such shipments to Montgomery, the longer-distance point by both said roads, and that all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland has to be hauled through Troy.

"2. That the rates on cotton established by said two roads and their connections on shipments to the Atlantic seaports—Brunswick, Savannah, and Charleston—unjustly discriminate against Troy and in favor of Montgomery, in that the rate per 100 pounds from Troy is 47 cents, and that from Montgomery, the longer distance point, is only 40 cents, and that such shipments from Montgomery over the road of the Alabama Midland have to pass through Troy.

"3. That on shipments for *export* from Montgomery and other points within 'the jurisdiction' of the Southern Railway and Steamship Association to the Atlantic seaports—Brunswick, Savannah, Charleston, West Point, and Norfolk—a lower rate is charged than the regular published tariff rate to such

seaports, in that Montgomery and such other points are allowed by the rules of said association to ship through to Liverpool via any of those seaports at the lowest through rate via any one of them on the day of shipment, which may be much less than the sum of the regular published rail rate and the ocean rate via the port of shipment; that this reduction is taken from the published tariff rail rate to the port of shipment; and that this privilege, being denied to Troy, is an unjust discrimination against Troy in favor of Montgomery and such other favored cities, and that it is, also, a discrimination against shipments which terminate at such seaport in favor of shipments for *export*.

"4. *That the Alabama Midland and the defendant carriers connecting and forming lines with it from Baltimore, New York, and the East to Troy and Montgomery charge and collect a higher rate on shipments of class goods from those cities to Troy than on such shipments through Troy to Montgomery, the latter being the longer-distance point by 52 miles.*

"5. *That the rates on 'class' goods from western and northwestern points established by the defendants forming lines from those points to Troy are relatively unjust and discriminatory as against Troy when compared with the rates over such lines to Montgomery and Columbus.*

"6. That Troy is unjustly discriminated against in being charged on shipments of cotton via Montgomery to New Orleans the full local rate to Montgomery by both the Alabama Midland and the Georgia Central."

The provisions of the act to regulate commerce which are directly involved in these charges are contained in *section 3*, which forbids *undue or unreasonable preferences* or advantages between persons, *localities*, etc., and *section 4*, which declares unlawful the greater charge in the aggregate "for a shorter than a longer distance over the same line, in the same direction, the shorter being included in the longer," known as the "long and short haul" rule of the statute. These provisions of the act, for convenience of reference, are given below:

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, *or locality*, or any particular description of traffic, in any respect whatsoever, or to subject

any particular person, company, firm, corporation, or *locality*, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any resecpt whatsoever.

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.*"

Charges 1, 2, 3, and 4 allege departures from the "long and short haul" rule of the fourth section of the act, and charges 5 and 6 another form of unjust discrimination or undue preference under section 3.

The Commission, after due notice of the charges against them had been served on the defendant carriers, and on testimony taken and argument had in behalf of both parties, investigated the matters involved, as required in section 13 of the law, and made a "report in writing in respect thereto" under section 14. This report is set forth on pages from 51 to 66 of the record, both inclusive, and *presents in detail and at length the facts and grounds upon which the Commission based its order.* (A careful study of this report is due to the Commission, and will be of great service in reaching a thorough and correct understanding of this case.)

The Commission, as the result of its investigation, sustained the six charges above stated, and accordingly made

the order involved in this case. This order is as follows (Record, p. 69):

"It is ordered that the roads participating in the traffic involved cease and desist (1) from charging and collecting on class goods shipped from Louisville, St. Louis, and Cincinnati to Troy a higher rate than is now charged and collected on such shipments to Columbus and Eufaula; (2) from charging and collecting on cotton shipped from Troy via Montgomery to New Orleans a higher rate than 50 cents per hundred pounds (being the rate from Columbus); (3) from charging and collecting on shipments of cotton from Troy for export *via* the Atlantic seaports, Brunswick, Savannah, Charleston, West Point, and Norfolk, a higher rate to those ports than is charged and collected on such shipments from Montgomery; (4) from charging and collecting on cotton shipped from Troy to Brunswick, Savannah, and Charleston a higher rate than is charged and collected on such shipments from Montgomery through Troy to those ports; (5) from charging and collecting on class goods shipped from New York, Baltimore, and the northeast to Troy a higher rate than is charged and collected on such shipments to Montgomery, and (6) from charging and collecting on phosphate rock shipped from the South Carolina and Florida fields to Troy a higher rate than is charged and collected on such shipments through Troy to Montgomery."

The defendant carriers refused or neglected to obey this order, and thereupon the Commission, in pursuance of section 16 of the act to regulate commerce, instituted this cause or proceeding for its enforcement in the circuit court of the United States for the middle district of Alabama. That court denied and dismissed the petition of the Commission, and its action was affirmed by the United States circuit court of appeals for the Fifth circuit. From the latter court the case is brought on appeal to this court.

The specifications of error are twenty-five in number and are set forth on pages from 409 to 411 of the record. The first nine assign as error the affirmance of the decree of the court below, the failure to reverse the decree below, the failure to decree the enforcement of the order of the Commission as an

entirety, and, also, *separately*, the failure to decree the enforcement of *each* of the six subdivisions of the order. The remaining specifications are as follows:

"10. Said court erred in ignoring, in effect, the fact that *Troy is shown by the evidence in said cause to be a competitive point as well as Montgomery and Columbus.*

"11. Said court erred in holding in effect that, while the existence of long through competing lines of transportation to Montgomery would naturally operate to lower rates to that city, the existence of such lines to Troy should not have the same effect on rates to that city.

"12. Said court erred in holding that competition between lines of transportation to Montgomery is a circumstance which under section 3 of the act to regulate commerce will justify the giving to that city a preference or advantage in rates over Troy.

"13. Said court erred in holding that such competition constitutes a dissimilar circumstance or condition under section 4 of the act to regulate commerce.

"14. Said court erred in holding in effect that competition of carrier with carrier, both subject to the act to regulate commerce, will justify a departure from the rule of the fourth section of said act *without authority from the Interstate Commerce Commission under the proviso to that section.*

"15. Said court erred in not holding that if competition could in any event relieve a carrier from the rule of the fourth section of the act to regulate commerce or justify discrimination in any form, such competition must be actual—not merely possible or probable—and of controlling force, and in respect to traffic important in amount.

"16. Said court erred in not holding, as appellant contended, that *competition which will be brought into action only by unreasonable or excessive rates is not such competition as will relieve a carrier from the rule of the fourth section of the act to regulate commerce or justify discrimination in any form, and that to allow the natural outcome or result of excessive rates to be made the ground for a license to discriminate is to permit the carrier to take advantage of his own wrong.*

"17. Said court erred in holding that the competition proven in said cause justifies the discrimination *to the extent shown to exist under the rates complained of.*

"18. Said court erred in not holding that the rates prescribed by the Interstate Commerce Commission in its order *make due allowance for any dissimilarity of circumstance or condition shown to exist affecting transportation to Montgomery and Troy, respectively.*

"19. Said court erred in holding in effect that because the proportion of the through rates from St. Louis, Louisville, and Cincinnati to Troy charged for the haul from Montgomery to Troy *is reasonable as a local rate on a strictly local shipment originating at Montgomery and terminating at Troy it is also reasonable as a proportion of said through rates.*

"20. Said court erred in finding as a matter of fact that 'the Alabama River, open all the year round, is capable, if need be, of bearing to Mobile on the sea the burden of all the goods of every class that pass to and from Montgomery.'

"21. Said court erred in finding as matter of fact, in the absence of any proof to that effect, that 'the competition of the railway lines' (to Montgomery) 'is not stifled, but is fully recognized, intelligently and honestly controlled and regulated by the traffic association' (meaning the Southern Railway and Steamship Association) 'in its schedule of rates.'

"22. In its opinion in said cause said court states as a material matter that '*there is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association*' (Southern Railway and Steamship Association) '*are incompetent or under the bias of any personal preference for Montgomery or prejudice against Troy that has led them or is likely to lead them to unjustly discriminate against Troy.*'

"The court erred in thus holding in effect that proof of that character is necessary in order to make out a case of unjust discrimination under the law and that it is a proper inference from the failure to make such proof that the rates in question are not unjustly discriminating as against Troy.

"23. Said court erred in holding that the rates to Montgomery are regulated and controlled by competition between the transportation lines to that city, when it appears that said rates are established by agreement between the carriers composing said lines as members of the Southern Railway and Steamship Association.

"24. Said court erred in finding as a matter of fact that the rates by the rail lines to Montgomery have been reduced by water competition by the Alabama River line 'to the level of the lowest practical paying water rate.'

"25. Said court erred in holding in effect that if a dissimilarity of circumstance or condition justifying *some discrimination in rates exists, the extent of the discrimination thus authorized is a matter for the determination of the carriers alone*, and that 'carriers are better qualified to adjust such matters than any *court or board of public administration*,' and 'it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business.'"

II.

MATTERS OF FACT ALLEGED IN THE CHARGES NOT DISPUTED. EXTENT OF THE DISCRIMINATIONS THUS ADMITTED.

The facts alleged in or upon which the six charges against the defendant carriers were based are not controverted. If they be disputed, they are sustained by the evidence and by the findings of fact set forth in the report and opinion of the Commission. (Record, pp. 52–66.) The facts so set forth are made by sections 14 and 16 of the act *prima facie* evidence in all judicial proceedings as to each and every fact found.

It is not disputed that, as alleged in the *first* charge and found by the Commission, $3.22 per ton is exacted on shipments of phosphate rock from the South Carolina and Florida fields to Troy, while only $3 is charged on such shipments through Troy, 52 miles farther on to Montgomery; nor that, as alleged in the *second* charge and found by the Commission, the rates on cotton shipped to the Atlantic ports, Brunswick, Savannah, and Charleston, are higher from Troy than from Montgomery *via* the Georgia Central and through Troy *via* the Alabama Midland, said rates having been at the time of the filing of the complaint before the Commission 40 cents per 100 pounds from Montgomery and 47 cents per 100 pounds from Troy.

It is not denied, as found by the Commission, that the privilege set forth in the third charge in reference to shipments for export *via* Brunswick, Savannah, Charleston, West Point, and Norfolk is granted to Montgomery and other Southern Railway and Steamship Association points, but is denied to Troy; nor that, as alleged in the sixth charge and found by the Commission, there is exacted on through shipments of

cotton from Troy *via* Montgomery to New Orleans the full local rate to Montgomery as a part of the through rate.

The two principal charges in the complaint, to which the bulk of the testimony relates, are *charges 4 and 5*.

Charge 4.

As to charge 4—that on shipments of class goods from New York, Baltimore, and the East to Troy and Montgomery, respectively, over the Alabama Midland as the terminal road, higher rates are charged to Troy than on such shipments through Troy, 52 miles farther on, to Montgomery—the finding of the Commission and the undisputed proof are that those rates per 100 pounds are as shown in the tables below:

Sea to Charleston, Savannah, etc., and rail thence.

Class.	From New York—		From Baltimore—	
	To Montgomery.	To Troy.	To Montgomery.	To Troy.
1	114	136	106	129
2	98	117	90	111
3	86	103	83	98
4	73	89	70	84
5	60	74	57	70
6	49	61	46	58
A	36	.....	33	.....
B	48	.....	45	.....
C	40	.....	37	.....
D	39	.....	36	.....
E	58	.....	55	.....
H	68	.....	72	.....
I (per barrel)	78	.....	65	.....

All rail.

Class.	From New York—		From Baltimore—	
	To Montgomery.	To Troy.	To Montgomery.	To Troy.
1	114	144	106	136
2	98	123	90	115
3	86	108	83	105
4	73	93	70	90
5	60	77	57	74
6	49	63	46	60
A	36	.....	33	.....
B	48	.....	45	.....
C	40	.....	37	.....
D	39	.....	36	.....
E	58	.....	55	.....
H	68	.....	65	.....
F (per barrel)	78	.....	72	.....

In order that the court may be able to appreciate fully the extent of the discrimination under these rates against Troy and in favor of Montgomery, the following table is submitted, showing how much greater per ton and per *minimum* carload of 20,000 pounds the charges will be under these rates on shipments from New York to Troy than on such shipments through Troy, 52 miles farther on, to Montgomery:

Excess of rate charges to Troy over those to Montgomery on shipments from New York.

Class.	Sea and rail.		All rail.	
	Per ton.	Per carload of 20,000 pounds.	Per ton.	Per carload of 20,000 pounds.
1	$4.40	$44.00	$6.00	$60.00
2	3.80	38.00	5.00	50.00
3	3.40	34.00	4.40	44.00
4	3.20	32.00	4.00	40.00
5	2.80	28.00	3.40	34.00
6	2.40	24.00	2.80	28.00

The excess on shipments from Baltimore is the same as the above under the all-rail rates and varies but little from the above under the sea-and-rail rates.

The "sea-and-rail" rates are by the steamship lines from Baltimore and New York to Charleston and Savannah and other South Atlantic ports and thence by rail to Troy and Montgomery, and the "all-rail" rates are by the all-rail lines. It will be noticed that while both these sets of rates—that is, the "sea-and-rail" and the "all-rail"—are the same to Montgomery, the "all-rail" rates to Troy are materially higher than the "sea-and-rail" rates to Troy.

Charge 5.

This charge involves the through rates on class goods from Louisville and other Ohio River points to Troy on the one hand and Montgomery and Columbus on the other, the complaint being that the rates to Troy are unjustly discriminatory against Troy in comparison with those to the latter cities. The rates per 100 pounds from Louisville and Cincinnati to the three cities are (Record, p. 61):

Classes	1	2	3	4	5	6	A	B	C	D	E	H	F*
From Louisville, Ky., to—													
Troy, Ala	140	130	113	95	75½	62	45	50	37	32	69	59	66
Montgomery, Ala	98	92	78	63	52	41	28	31	24	20	48	33	40
Columbus, Ga	107	92	81	68	56	46	28	36	29	25	50	55	50
From Cincinnati, Ohio, to—													
Troy, Ala	150	140	123	103	82½	68	49	52	39	34	73	63	70
Montgomery, Ala	108	102	88	71	59	47	32	33	26	22	52	37	44
Columbus, Ga	117	102	91	76	63	52	32	38	31	27	54	59	54
From St. Louis, Mo., to—													
Troy, Ala	168	153	133	109	87½	72	52	58	44	37	77	69	80
Montgomery, Ala	126	115	98	77	64	51	35	39	31	25	56	43	54
Columbus, Ga	135	115	101	82	68	56	35	44	36	30	58	65	64

* Per barrel.

The distance from Louisville to Montgomery over the Louisville and Nashville road is 490 miles, and from Montgomery to Troy over the Alabama Midland, 52 miles.

The following table shows the mileage rate on the different classes, in *mills*, per 100 pounds yielded by the through rate from Louisville to Montgomery and by the additional charge

on through shipments from Louisville to Troy for the haul from Montgomery to Troy (Record, p. 62):

Mills per 100 pounds.

Classes	1	2	3	4	5	6	A	B	C	D	E	H	F
Louisville to Montgomery	2	1.8	1.6	1.3	1.06	0.83	0.57	0.63	0.49	0.40	0.98	0.67	0.40
Montgomery to Troy	8	7.1	6.7	5.9	3.8	4	2.6	3.6	2.5	2.3	4	5	2.5

A comparison of the above mileage rates from Louisville to Montgomery and from Montgomery to Troy, which rates from Louisville are taken as illustrative, shows that the proportion of the rate from Montgomery to Troy on *through* hauls from Louisville is *from four to seven times as large per mile as that from Louisville to Montgomery.*

Some idea may be had of the injury resulting to Troy merchants on account of this discrimination from the following table, showing the aggregate rates at which class goods can be shipped from Louisville to Montgomery and Troy, respectively, and then reshipped from Troy and from Montgomery through Troy to points named beyond Troy (Record, p. 62):

From Louisville, Ky.

(In cents per 100 pounds, except Class F, which is per barrel.)

Classes	1	2	3	4	5	6	A	B	C	D	E	F
To Brundidge, Ala.:												
Reshipped from Montgomery, Ala.	146	136	117	98	81	65	52	52	38	33	72	68
Reshipped from Troy, Ala.	168	154	135	115	93½	76	59	62	46	40	83	84
To Ozark, Ala.:												
Reshipped from Montgomery, Ala.	156	144	122	103	84	67	54	54	40	35	74	72
Reshipped from Troy, Ala.	176	161½	143	122	95½	80	59½	66	49	43	87	90
To Dothan, Ala.:												
Reshipped from Montgomery, Ala.	162	147	125	106	88	71	57	57	40	35	78	72
Reshipped from Troy, Ala.	188	174	152	130	104½	86	69	71	51	45	93	94

Brundidge, Ozark, and Dothan are towns and stations on the Alabama Midland Railway, all east of Troy, and shipments to them over that road from Montgomery pass through Troy. Brundidge is 17 miles from Troy and 69 from Montgomery; Ozark, 40 miles from Troy and 92 from Montgomery; and Dothan, 68 miles from Troy and 120 from Montgomery.

The rates from Louisville to Columbus and Troy, respectively, plus the rates on reshipments from those cities to Brantley, in cents per 100 pounds, except Class F, which is per barrel, are as follows (Record, p. 62):

Classes.	From Louisville—	
	To Brantley, Ala., reshipped from Columbus.	To Brantley, Ala., reshipped from Troy.
1	1.73	1.76
2	1.53	1.64
3	1.32	1.43
4	1.10	1.19
5	.90	.95½
6	.73	.78
A	.52	.60
B	.63	.66
C	.50	.50
D	.44	.44
E	.84	.89
F (per barrel)	.92	.92

Brantley is on the Georgia Central road, 26 miles south of Troy and 111 miles from Columbus, and goods shipped from Columbus to Brantley over that road pass through Troy.

The result of the relatively high rates to Troy from Ohio River points, Louisville being taken as an illustration, is that *Montgomery can reship goods received from Louisville through Troy and 68 miles beyond to Dothan at an aggregate rate of 26 cents per 100 pounds and $5.20 per ton less than the aggregate rate from Troy on such reshipments* and the Troy merchant, being

unable to compete at such a disadvantage, is driven out of the business in towns surrounding Troy. (See answers to sixth direct interrogatory of E. H. Bashinsky, Record, p. 236; L. M. Bashinsky, Record, p. 241; B. M. Talbot, Record, p. 224; Charles Henderson, Record, p. 228.)

III.

PLEA OF COMPETITION BY THE CARRIERS IN JUSTIFICATION OF THEIR ADMITTED DISCRIMINATIONS AGAINST TROY IN FAVOR OF HER COMPETITORS IN BUSINESS (MONTGOMERY AND COLUMBUS). PROPOSITIONS CONTENDED FOR IN BEHALF OF COMMISSION.

The contention of the carriers is that, conceding the facts upon which the charges made by the Board of Trade of Troy are predicated, they do not constitute any of the offenses denounced in the act to regulate commerce, because of an alleged material dissimilarity in the circumstances and conditions attending the transportation of traffic to Troy on the one hand, and Montgomery and Columbus on the other.

They do not set up any dissimilarity in the circumstances and conditions relating to the *nature and character of the service* of transportation to Troy, on the one hand, and Montgomery and Columbus, on the other, but plead in justification of their admitted discriminations against Troy such dissimilarity as existing because of competition encountered in transporting traffic to the latter cities, which, it is claimed, is not met *to the same extent* in such transportation to Troy. In a supplemental brief (p. 6), filed in the circuit court of appeals, counsel for the roads says "the defendants do not pretend to offer the slightest justification" for the discriminations against Troy, "except the solitary fact of competition at the longer-distance point," Montgomery.

As respects the plea of competition, it is contended on the part of the Interstate Commerce Commission:

"*First.* That, so far as the alleged violations of the 'long and short haul rule' of the fourth section of the act are concerned, carriers can not justify departures from that rule on the ground of competition in transportation to the longer-distance point, unless such departures are authorized by the Commission under the proviso to that section.

"*Second.* That, if competition in transportation can under any circumstances justify departures from the rule of relative equality in rates as between different *localities* laid down in the third and fourth sections of the law, the competition, if any, shown in this case can not be invoked for that purpose.

"*Third.* If the competition alleged in this case can justify any discrimination whatever against Troy in favor of her competitors in business (Montgomery and Columbus), it does not justify discrimination *to the extent* shown.

"*Fourth.* That the order of the Commission in question in this case makes allowance for whatever dissimilarity of circumstance or condition as between Montgomery and Columbus on the one hand and Troy on the other may have been proven."

IV.

PROVISO TO SECTION 4 OF THE LAW—CARRIERS CAN NOT JUSTIFY DEPARTURES FROM THE "LONG AND SHORT HAUL" RULE OF THE FOURTH SECTION OF THE INTERSTATE COMMERCE LAW ON THE GROUND OF COMPETITION IN TRANSPORTATION TO THE LONGER-DISTANCE POINT UNLESS SUCH DEPARTURES ARE AUTHORIZED BY THE COMMISSION UNDER THE PROVISO TO THAT SECTION.

The rule of the fourth section of the act is that—

"It shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the *transportation* of passengers or of like kind of property *under substantially similar circumstances and conditions* for a shorter than a longer distance over the same line," etc.

The proviso to this rule is—

"Provided, however, that upon application to the Commission appointed under the provisions of this act, such common carrier may, *in special cases*, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of the act."

The proviso as well as the rule must be given a field of operation, and the question is, *first*, What are the "*similar circumstances and conditions*" referred to in the body of the rule and under which the greater charge for the shorter than the longer haul is forbidden? and, second, What are the "*special cases*" referred to in the proviso in which the Commission may, on application of the carrier, authorize a departure from the rule?

The rule forbids the greater charge for the shorter haul only when the "circumstances and conditions" mentioned in the body of the rule are substantially *similar*. If those "circumstances and conditions" are substantially *dissimilar*, the rule does not apply and there can be no necessity for application to the Commission under the proviso for exemption from the operation of the rule. The proviso can come into operation only where the rule applies—in other words, where the circumstances and conditions referred to in the rule are "substantially similar." If those circumstances and conditions are "substantially similar," and the carrier desires exemption from the rule, it must be on other grounds than those covered by the words "substantially similar circumstances and conditions," and the proviso in the use of the words "special cases" relates to those other grounds.

Light is shed upon the meaning of the words "similar circumstances and conditions," by the fact that they qualify or limit the word "*transportation*."

It is the greater charge for the "transportation"—that is, service or act of carriage—under substantially similar circumstances and conditions which is forbidden. The rule expressly relates to *transportation under substantially similar circumstances and conditions.* The circumstances and conditions would, therefore, appear to be *ex vi termini* those directly affecting or which inhere in the transportation or carriage of the goods and not extraneous conditions which may affect the business of carriage.

Congress, doubtless, considered that the circumstances and conditions which bear directly upon the service of transportation were peculiarly within the knowledge of the carrier, and therefore that the carrier might in fixing its rates make proper allowance for any substantial dissimilarity in such circumstances and conditions without coming within the purview of the rule and without prior authority from the Interstate Commerce Commission under the proviso to the rule.

The circumstances and conditions bearing directly on the carriage may relate to, among other things, *rate of speed; risk*—as whether the goods are transported at shippers' risk or at carriers' risk as expressed in the bill of lading; *quantity shipped*—as whether shipped in carloads or less than carloads; *form or condition* in which shipped, as in case of furniture, whether shipped "set up" or "knocked down," or, in case of grain, whether shipped in small lots in sacks or loose in carloads, and so on through the great variety of articles of commerce which are transported in different quantities and forms.

The "circumstances and conditions" bearing directly on the service of carriage being substantially similar, the rule applies and forbids the greater charge for the shorter than the longer haul. If the carrier desires exemption from the rule, the proviso authorizes an application to the Commission which may

in "special cases" after investigation grant such exemption and prescribe its extent.

What are those "special cases"? Competition affects the business of public carriage as distinguished from the actual service; and it may be that competition, and, possibly, other matters, not directly connected with the service of transportation, constitute those "special cases." *That is, however, a matter confided by the proviso, in the first instance, exclusively to the discretion of the Commission.*

In *Osborne* v. *Chic. & N. W. Ry. Co.* (48 Fed. Rep., 49), when that case was before the circuit court, it was held:

"Under the interstate commerce law the power of determining whether a railroad company is relieved from the operation of the long and short haul clauses lies solely with the Interstate Commerce Commission.

* * * * * * *

"The consideration of questions of that kind, of the right of the railway company to be excused from the duty and obligation that is placed upon it by the fourth section of the interstate commerce law, is, by the express terms of the law itself, conferred upon the Interstate Commerce Commission. As you know, there is a body of commissioners provided for by this interstate commerce act, and the fourth section of that act, by its express terms, in a proviso that is therein contained, places upon the Commission the duty and gives them the authority to investigate and determine whether there are such facts and circumstances surrounding a railroad at a given time as would justify the Commission in authorizing the railway company to charge a greater sum for a shorter than for a longer haul over the same line, in the same direction, *under otherwise substantially similar circumstances.* * * * Questions of that kind are for the judgment and determination of the board of commissioners appointed under this act, and the courts and juries, when they are called to act upon particular cases arising under this act, where it is claimed that the law has been violated, are only authorized to determine the question whether, *in the service rendered, the character of the property, its conveyance,* and *other facts which inhere in the carrying of the freight upon the particular line which is charged with the wrongdoing,* there existed dissimilar circumstances and conditions, relieving the company from the charge of collecting the larger rate for the shorter haul over the same line, in the same

direction, and under otherwise substantially similar circumstances and conditions. Now, then, if the railway company had been authorized to do that, then they would plead and prove that fact, and it would then be the duty of the court to instruct the jury that that would justify the railway company in making the larger rate for the shorter distance; but no such action has been taken by the Interstate Commission. They have not been called upon to act, and they have not authorized the railway company to charge a greater sum for the shorter than for the longer distance."

This case was taken to the circuit court of appeals, and Justice Brewer held, as was manifestly true, that the long and short haul rule of the statute was not involved, because there was no greater charge in the aggregate for the shorter than the longer haul. (52 Fed. Rep., 912.) Of course *a proviso to a rule can have no application where the rule itself does not apply.* Justice Brewer therefore makes no reference whatever to the position in reference to the proviso taken by the circuit court in the above quotation from the opinion of that court, which position, we submit, can not be successfully controverted in a case where the rule itself is involved.

Counsel for the Louisville and Nashville Railroad Company, in order to find some field of operation for the proviso, stated in his argument before the circuit court of appeals that it applied to a case where it was desired to build up a manufacturing or other enterprise at a particular point, and rates discriminating in favor of such point were necessary for that purpose. In such a case, he said, the carrier might apply to the Commission under the proviso for permission to make the discrimination.

The law, in the language of the Supreme Court in *Union Pacific Co* v. *Goodrich* (149 U. S., 680), was "designed to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, *special enterprises*, or favored corporations," * * * and *the Commission is powerless to grant a license to violate the law.*

That a carrier can not discriminate for the purpose of building up local industries along its line is held in the following English cases: *Denaby Main Coaling Company Case* (11 Appeal Cases, 97); *Ransome* v. *Eastern Counties Railway Company* (1 C. B. N. S., 437); *Oxlade* v. *N. E. Railway Company*, (*id.*, 454).

The building up of "special enterprises, particular localities, and favored corporations" does not fall within the ligitimate sphere of action of public carriers. The abuses which the act to regulate commerce was intended to remedy arose from the assumption of this right on the part of carriers. The administration of the business of public carriage should be *just* rather than *paternal*. Under rates relatively equal to all points, enterprises and commercial centers will be built up where they *naturally* belong, and the carrier will be more prosperous than under the present system of discrimination prevailing in the South.

This system of discrimination known as the "trade center or basing point system," under which the rates in question in this case are established, and which prevails exclusively in the South, is discussed at length in Part XI, *infra*, of this argument.

V.

IF COMPETITION BETWEEN CARRIERS CAN UNDER ANY CIRCUMSTANCES JUSTIFY DISCRIMINATION THE COMPETITION, IF ANY, SHOWN IN THE PRESENT CASE DOES NOT.

(*a*) *The rates to Montgomery fixed by agreement and not by competition.*—As preliminary to the main question discussed in this subdivision of my argument, attention is called to the fact that the rates in question, both from the East and the West, to Montgomery and other localities in the South recognized as competitive points, were fixed by agreement between the carriers as members of the Southern Railway

and Steamship Association. The so-called "jurisdiction" of this association as to the regulation of rates covers the territory east of the Mississippi and south of the Ohio and Potomac rivers. This fact relates to such a large area of the country and is of such general notoriety that the court is authorized to take judicial notice of it. It is disclosed incidentally in the testimony of W. F. Vandeveer, in answer to the seventh direct interrogatory propounded to him (Record, p. 289), when he says that "in 1886 the merchants of Montgomery, on account *of the high rate in force at Montgomery* as compared with Mobile, *appealed to the Southern Railway and Steamship Association for a reduction in rates from Eastern and Western points.*" It is also alluded to in charge 3 and the proof before the Commission in support of that charge.

George C. McCormick, a witness for the carriers, testifies that "the railroad lines coming into Eufaula are under one management or system, and *therefore not competing.*" (Answer to tenth direct interrogatory, Record, p. 340.) This is equally true as to the lines coming into Montgomery; they are under one management or system so far as relates to fixing of rates. These rates are the result of agreement, and not of competition. Indeed, *the main object of an agreement between rival lines as to the rates to be charged by them is the prevention of competition.* The frequently ruinous nature of the competition, resulting in what are termed "rate wars," brings about the agreement, but the rates agreed upon are not in any proper sense the result of competition. They are, on the contrary, the result of an *agreement to desist from competition*, and are such as the roads choose to make them, competition being eliminated from the situation, and, this being the case, it is scarcely necessary to add they will be sufficiently remunerative and not unreasonably low from a railroad standpoint.

(*b*) *Routes from Cincinnati, Louisville, St. Louis, and the*

West which it is claimed compete with and control the rates over the direct rail routes to Montgomery.—The competition in transportation to Montgomery from Cincinnati, Louisville, St. Louis, and the West, relied upon by the roads and to which their testimony relates, is by one or the other of the following two routes:

1. *By the all-water route*, down the Ohio and Mississippi rivers to New Orleans, across the Gulf of Mexico to Mobile, and up the river to Montgomery. The distance from Cincinnati, Louisville, and St. Louis by this route to Montgomery is about 2,000 miles. Traffic transported by this route has to be transferred from the river boat to a Gulf boat at New Orleans, from the Gulf boat to a river boat at Mobile, and the trip will consume two weeks. It takes from three and a half to four days for a boat to go from Mobile up the river to Montgomery.

2. *By rail to* Mobile and water up the river to Montgomery. The distance by rail to Mobile from St. Louis over the short line, the Mobile and Ohio road, is 644 miles, and to Montgomery over the Louisville and Nashville road, the short line, it is 625 miles; from Cincinnati to Mobile, the distance by the short line, the Louisville and Nashville road, is 780 miles, and to Montgomery, 600 miles; and from Louisville to Mobile over the Louisville and Nashville road, the short line, the distance is 670 miles, and to Montgomery, 490 miles. The distance, therefore, by rail from St. Louis to Montgomery is 19 miles less than to Mobile, and from Cincinnati and Louisville to Montgomery the distances by rail are 180 miles less than to Mobile.

Traffic from Louisville, Cincinnati, and St. Louis, in order to reach Montgomery by way of rail to Mobile and thence up the river to Montgomery, must, after having in the first instance been hauled by rail a greater distance to Mobile than it has to

be hauled by rail to Montgomery, be transferred at Mobile from the cars to a boat and then carried 400 miles up the river, consuming three and a half days for the river trip. The water haul under such circumstances would not be an advantage, but would involve additional delay and expense.

(c) *Route of alleged competition in transportation to Montgomery from the East.*—The competition in transportation to Montgomery from Baltimore, New York, and other northeastern cities, relied upon by the roads, and to which their testimony relates, is by the water route over the Atlantic, around Florida Keys, across the Gulf to Mobile, and thence up the Alabama. This route is about 2,000 miles in length, and transportation over it involves transfer at Mobile and nearly two weeks' consumption of time.

(d) *Routes of alleged competition in transportation to Columbus and Eufaula from the West and East.*—These routes are from the West *via* the Ohio and Mississippi rivers to the Gulf, across the Gulf to Apalachicola, Fla., or from the East, over the Atlantic, around Florida Keys, across the Gulf to Apalachicola, and thence, in both cases, up the Chattahoochee River to Eufaula and Columbus. These routes are thousands of miles in length, involve transfers and great consumption of time. At Apalachicola traffic would have to be transferred from the ocean steamer or vessel to a lighter and from the lighter to the river steamer, because sea-going vessels can not enter the harbor at that city. (Answer to seventh cross-interrogatory, Record, p. 320.)

As to competition in transportation to Columbus and Eufaula over these routes *via* Apalachicola and the Chattahoochee River, the testimony shows that none of controlling force has existed since the direct rail lines came into operation. J. E. Grady, for forty years a resident of Apalachicola, and for many years collector of customs at that port, testifies that

there have been no through shipments from the East or West to Columbus and Eufaula *via* Apalachicola and the Chattahoochee River "for fifteen years to his knowledge." (Answer to fourth direct interrogatory, Record, p. 395.) See also on this point testimony of John O. Martin (answers to second and fourth cross-interrogatories, Record, p. 314) and W. R. Moore (answers to sixth and seventh direct interrogatories, Record, p. 318, and to sixth cross-interrogatory, Record, p. 320).

(*e*) *Under normal conditions competition by these indirect routes can not control or materially influence rates over the direct rail lines.*—The general, if not invariable, rule is, that the short line between two terminal points fixes the rate for all lines between those points. Time is an element of the first importance in commercial transactions. It would be anomalous, if these long, circuitous water (or rail and water) routes, to which transfers, great consumption of time, and other disadvantages are incident, could by their competition control or materially influence the rates on the shorter, more direct, and expeditious rail lines, over which through traffic is transported in carloads without transfer or breakage of bulk from points of origin to destinations. The thought will suggest itself that if competition by these long, indirect lines with the direct lines can ever become of controlling force, *it must result from some exceptional or abnormal condition.* On examining the testimony we find this to be the case. The evidence shows that competition by the water or water and rail routes has only been brought into action by excessive or unreasonable rates on the direct rail lines, and when the rates of the latter have been made even approximately reasonable, it has disappeared. In support of this, attention need only be called to the testimony of witnesses for the roads. Three of the leading grocery merchants of Montgomery, W. F. Vandeveer, J. Greil, and Henry M. Hobbie, and M. B. Houghton, a banker

and president of the Commercial and Industrial Association of Montgomery, were examined as witnesses by the roads.

Mr. Vandeveer testifies:

"In 1886 the merchants of Montgomery, on account of the *high rate in force at Montgomery* as compared with Mobile, appealed to the Southern Railway and Steamship Association for a reduction in rate from Eastern and Western points. That appeal was unheeded, and the merchants, feeling that they *were compelled to have relief in order to maintain their business*, organized a stock company in Montgomery, with a capital of $35,000, and bought the steamers *Alabama* and *Jewel*, having each a tonnage of 400 tons, and ran them on the Alabama River *for two years, until they succeeded in securing an adjustment of rates more satisfactory to them, but still not such rates as placed them on an equality with Mobile.*" (Answer to seventh direct interrogatory, Record, p. 289.)

Mr. Greil testifies:

"I *have*" (past tense) "received shipments at Montgomery by river which came *via* Mobile from points west of Mobile. Several years ago, when there was such a great difference in the rates of freight between Montgomery and Mobile, the merchants of Montgomery went to work and put two steamers on the Alabama River, the *Jewel* and the *Alabama*, which were run by said merchants, who were the principal stockholders, between Montgomery and Mobile." (Answer to third direct interrogatory, Record, p. 281.)

"I *have*" (past tense) "received at Montgomery shipments by river which came *via* Mobile from Boston, New York, Philadelphia, Baltimore, and other Eastern cities. These shipments were received at various times, but *were not so very large.* They were received *during the same period* referred to in my answer to the third interrogatory, *when that line of boats was established by the merchants.*" (Answer to fourth direct interrogatory, Record, p. 282.) "During the time referred to by me in my answers to the direct interrogatory, when the line of steamboats was established on the Alabama River by the merchants of Montgomery, the largest proportion of shipments to me from points west of Mobile came to me by river at Montgomery *via* Mobile, but I can not state more definitely what proportion so came. *Since rail rates have been readjusted satisfactorily to the merchants, most of our goods* come by rail." (Answer to fifth cross-interrogatory, Record, p. 283.) "I know that in the event it should become necessary, *on account of the*

high rail rates, that all the boats necessary to do the bulk of the business done at Montgomery could be procured for the river service." (End of answer to twelfth cross-interrogatory, Record, p. 285.)

Mr. Houghton testifies:

"In the event rail rates were again advanced, or any *unfair discrimination was made against Montgomery*, it is practicable to obtain all the steamboats necessary to do all the business from eastern and western points to Montgomery." (Answer to twelfth cross-interrogatory, Record, p. 288.)

Mr. Hobbie testifies:

"I *have*" (past tense) "received at Montgomery shipments by river which came *via* Mobile from Boston, New York, Philadelphia, Baltimore, and other Eastern cities. On account *of high rail rates in 1886* my company began shipping goods from New York, Philadelphia, Boston, and other eastern points *via* Mobile, and from there to Montgomery by river. These shipments so received came every few weeks and *continued for two years*, according to the best of my recollection." (Answer to fourth direct interrogatory, Record, p. 297.) "At this time all shipments from Louisville, Cincinnati, St. Louis, and New Orleans came to me at Montgomery by rail routes. We are now making no shipments by river *via* Mobile." (Answer to fifth cross interrogatory, Record, p. 299.) "All of my shipments from Boston, New York, Philadelphia, Baltimore, and other Eastern cities come to me at this time to Montgomery by other routes than by river *via* Mobile. Said shipments usually come *via* Savannah or Norfolk." (Answer to sixth cross-interrogatory, Record, p. 299.) "The fact that the Alabama River is navigable for steamboats between Montgomery and Mobile has the effect of *restraining railroads from exacting undue rates from us*." (Answer to seventh direct interrogatory, Record, p. 297.)

All the witnesses, it will be observed, refer to the same period—the two years following the establishment of the river line in 1886—as the time when they received through shipments by the Alabama River from the East and the West. *No competition of controlling force by the river route as to such shipments is shown except during that period.* That, the witnesses say, was brought into action by high or excessive rail

rates, and ceased when the rates were made more reasonable. The river, in the language of the witness Hobbie, has the "*effect of restraining railroads from exacting undue rates from us.*"

The testimony as to competition in transportation to Eufaula and Columbus *via* the Chattahoochee River is also to the effect that it can be brought into active operation only by *excessive rail rates.*

George H. Dent, a witness for the roads, testifies:

"The difference between the towns of Eufaula and Troy, with respect to the circumstances and conditions affecting the transportation of traffic to and from those cities, respectively, is that Eufaula is situated upon a navigable stream, through which shippers can seek relief whenever railroad rates become *onerous or burdensome*, while Troy is an inland town and has no waterway." (Answer to tenth direct interrogatory, Record, p. 344.)

A. Berringer, a witness for the roads, testifies:

"The fact that the Chattahoochee River is navigable by steamboats has the effect of preventing the railroads *from overcharging in their rates.*" (Answer to the sixth direct interrogatory, Record, p. 325.) "The principal difference between Troy and Eufaula is, that at Eufaula we have the river to fall back upon *when the railroad rates are unreasonable*, while Troy is an inland town, and without access to water transportation." (Answer to ninth direct interrogatory, Record, p. 326.)

Mr. J. G. Gince, a witness for the roads, testifies:

"The fact that the Chattahoochee River is navigable has the effect of keeping down the rates charged by railroads. In other words, it *has the effect of maintaining reasonable rates by rail.*" (Answer to eighth direct interrogatory, Record, pp. 334–335.) "If such a rate" (rail rate) "proved to be *excessive*, it is my opinion that boat lines would be established on the water routes." (Answer to eleventh direct interrogatory, Record, p. 335.)

The point which is sought to be emphasized is, that, taking all the testimony bearing upon the subject together, it only amounts to this, that abnormal rates, or, in other words,

excessive rates, by the direct rail lines will bring into action competition of controlling force by the indirect water or rail and water routes. We submit that if water competition can in any case make out the substantially dissimilar circumstances and conditions justifying discrimination within the meaning of the law, it must be such competition when brought into operation by reasonable rail rates or which will exist under normal conditions. To hold that the fact that excessive or unreasonable rates will divert traffic from rail to water lines constitutes such dissimilar circumstances and conditions will be to completely nullify or emasculate the remedial provisions of the statute. *Proof of that fact may be made in any case.* For example, proof can be made that a certain increase of rail rates between Montgomery and Troy will divert the traffic to the wagon or ox-cart lines which, it is said, existed before the railroads were built. Proof, doubtless, can be made that if both the rail and water rates to Montgomery were increased sufficiently, traffic to Montgomery would be diverted to the wagon lines which hauled traffic to Montgomery, as well as to Troy, before railroads came into operation. Excessive or prohibitory rates by one line or mode of transit will necessarily force the traffic to another line or mode of transit. If the flow of commerce is diverted from its natural channel by a dam, it will seek outlet by any other available route.

Courts in construing statutes must take into consideration the normal conditions which the law-making power must have had in mind in their enactment. To do otherwise is to base the *general rule* upon the *exception* or upon an exceptional condition of things.

The question here, the court, under the evidence in this case, is simply this: Are the roads to be allowed to discriminate against towns away from rivers, because, if unreasonable rates

are made by them to river towns, the natural effect of this wrong, perpetrated by them, will be to divert the traffic to the river line? To allow the natural outcome of an excessive rate to be made the basis of a license to discriminate is to permit the carrier to take *advantage of its own wrong.*

Attention of the court is called to the significant fact that the proof made by the roads to the effect that the Chattahoochee and Alabama rivers are necessary to enable Montgomery, Columbus, and Eufaula to obtain even approximately reasonable rates shows (if it be not an admission by them) the necessity for the regulation of the rates of carriers of interstate commerce by the General Government. In other words, it shows that they will act fairly and justly as between different localities *only under compulsion*, and demonstrates the necessity for such legislation as the "act to regulate commerce." Montgomery, Eufaula, and Columbus, say the witnesses for the roads, have their rivers to "fall back upon" for protection. The question arises, What protection have inland towns like Troy? Manifestly none except the protection of the law as enforced by the courts. The law was made for just such a case as that of Troy. If not, it can have no practical application whatever.

(*f*) *The river does not fully protect Montgomery from discrimination by rail lines in favor of Mobile, and therefore the river competition is not of controlling force.*

The witness Vandeveer, in his testimony quoted *supra*, states that the boat line was put upon the Alabama River by the Montgomery merchants "on account of the *high rates in force at Montgomery as compared with Mobile*," and that it resulted "in securing an adjustment of rates more satisfactory to them (the Montgomery merchants), but still *not such rates as placed them on an equality with Mobile.*"

This is an admission that the river does not give Montgomery

full protection from discrimination in favor of Mobile, and it appears clearly from the following table giving the rates on class goods from Louisville, Cincinnati, and St. Louis, to Montgomery and Mobile. (Record, p. 64.)

Rates in cents per 100 pounds.

Distances.	Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F
644 miles via M. & O. 805 miles via L. & N.	From St. Louis to Mobile.	90	75	65	50	40	35	25	25	25	20	28	25	45
625 miles via L. & N.	From St. Louis to Montgomery.	126	115	98	77	64	51	35	39	31	25	36	43	54
669 miles via L. & N.	From Louisville to Mobile.	90	75	65	50	40	35	25	25	25	20	28	25	45
490 miles via L. & N.	From Louisville to Montgomery.	98	92	78	63	52	41	28	31	24	20	48	33	40
779 miles via L. & N.	From Cincinnati to Mobile.	98	83	73	54	44	39	28	27	27	22	31	28	49
609 miles via L. & N.	From Cincinnati to Montgomery.	108	102	88	71	59	47	32	33	26	22	32	37	44

From this table it will be seen that the rates from St. Louis to Mobile are much lower than to Montgomery, although the haul from St. Louis to Mobile by the short line over the Mobile and Ohio road is 19 miles longer than the haul to Montgomery over the short line, the Louisville and Nashville road, and the latter road hauls traffic from St. Louis through Montgomery, 180 miles farther on, to Mobile at these much lower rates. The rates from Louisville and Cincinnati over the Louisville and Nashville road, the short line in both instances, are also materially lower to Mobile than to Montgomery, although the hauls are *through Montgomery and 180 miles farther on to Mobile*.

The Alabama River does not intervene between Cincinnati, Louisville, and St. Louis, and Montgomery, and is not on, *but beyond*, the direct line of transit, between the former and the latter. It is, however, on the direct line of transit from the former cities to Mobile, and, therefore, its influence on rates, if any, is in the direction of lower rates to Mobile.

VI.

THE COMPETITION, IF ANY, PROVEN IN THIS CASE DOES NOT JUSTIFY DISCRIMINATIONS AGAINST TROY IN FAVOR OF HER COMPETITORS IN BUSINESS (MONTGOMERY AND COLUMBUS) TO THE EXTENT SHOWN. THE ORDER OF THE COMMISSION MAKES ALLOWANCE FOR ANY POSSIBLE DISSIMILARITY OF CONDITION RESULTING FROM SUCH COMPETITION. THE CIRCUIT COURT OF APPEALS DOES NOT CONSIDER THESE PROPOSITIONS.

(*a*) The extent of the discrimination against Troy in favor of her competitors in business (Montgomery and Columbus) under the rates in question in this case is shown in Part II of this argument.

For example, as before stated, goods can be shipped from Louisville to Montgomery and then reshipped from Montgomery *through Troy and 68 miles beyond to Dothan* at an aggregate rate of 26 cents per 100 pounds less than the aggregate rate on such a reshipment from Troy; and on shipments from the East *through Troy and 52 miles beyond to Montgomery* the rate (sea and rail) per minimum carload of 20,000 pounds on first-class traffic is $14 higher to Troy than to Montgomery. Thus *Troy is cut both ways*, and her merchants are driven out of the territory immediately around her.

No dissimilarity of condition, resulting from competition or anything else, has been shown which can justify discrimination to that extent.

(*b*) The order of the Commission, it will be found on examination, requires a very conservative reduction in the rates to Troy and makes allowance for any possible dissimilarity of circumstance or condition affecting transportation to Montgomery. It is as follows (Record, p. 69):

"It is ordered that the roads participating in the traffic involved cease and desist (1) from charging and collecting on

class goods shipped from Louisville, Cincinnati, and St. Louis to Troy a higher rate than is now charged and collected on such shipments to Columbus and Eufaula; (2) from charging and collecting on cotton shipped from Troy, via Montgomery, to New Orleans a higher through rate than 50 cents per hundred pounds (being the rate from Columbus); (3) from charging and collecting on shipments of cotton from Troy for export via the Atlantic seaports, Brunswick, Savannah, Charleston, West Point, and Norfolk a higher rate to those ports than is charged and collected on such shipments from Montgomery; (4) from charging and collecting on cotton shipped from Troy to Brunswick, Savannah, and Charleston a higher rate than is charged and collected on such shipments from Montgomery through Troy to those ports; (5) from charging and collecting on class goods shipped from New York, Baltimore, and the Northeast to Troy a higher rate than is charged and collected on such shipments to Montgomery, and (6) from charging and collecting on phosphate rock shipped from the South Carolina and Florida fields to Troy a higher rate than is charged and collected on such shipments through Troy to Montgomery."

In the four instances where the haul is through Troy and Troy is the shorter distance point and Montgomery the longer-distance point by 52 miles, Troy is given by this order *not a less rate than Montgomery*, but the same rate. Those instances are: (1) Shipments of class goods from New York, Baltimore, and the Northeast to Troy and through Troy to Montgomery; (2) shipments of phosphate rock from the South Carolina and Florida fields to Troy and through Troy to Montgomery; (3) shipments of cotton from Troy and from Montgomery through Troy to Brunswick, Savannah, and Charleston, and (4) shipments of cotton for *export via* the South Atlantic ports from Troy and from Montgomery through Troy. In each of these cases, although the haul to or from Troy is 52 miles *less* than to or from Montgomery, Troy is charged under the order of the Commission *as much as Montgomery*. On the other hand, where the haul is from the West through Montgomery to Troy or from Troy through Montgomery to New Orleans, in which cases Montgomery is the shorter-distance point by 52 miles, the rule is reversed and the Troy rates are made higher

than the Montgomery rates. The question under this state of facts is whether the Commission went far enough in reducing the rates to Troy. If the order is objectionable at all, it is on this ground.

(c) *The circuit court of appeals does not consider the foregoing two propositions* (propositions 3 and 4, Part III, of this argument).

The circuit court of appeals, at the conclusion of its opinion, states that it does not "discuss" the two propositions, namely, that no dissimilarity of conditions has been shown justifying discrimination to the *extent* proven, and that the order of the Commission makes due allowance for any possible dissimilarity in such conditions.

The following is the language of the court on this point:

"*We do not discuss the third and fourth contentions of the counsel for the appellant*, further than to say that within the limits of the exercise of intelligent and good faith in the conduct of their business and *subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate* so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. *The carriers are better qualified to adjust such matters than any court or board of public administration*, and within the limitations suggested *it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business.*"

It is not denied that carriers have the right to fix and regulate their rate charges so as best to promote their business interests, "*subject to the two leading prohibitions that those charges shall not be unjust or unreasonable and that they shall*

not unjustly discriminate." If rates be just and reasonable under section 1 of the act to regulate commerce and not unjustly discriminatory under sections 2, 3, or 4, the Commission has and claims no authority in respect to their regulation.

The theory or leading idea of the two "contentions" or propositions referred to by the court is that, notwithstanding there may be a substantial dissimilarity of conditions, due allowance may be made therefor and the *rates may still be unreasonable or unjustly discriminatory.*

The position of the circuit court of appeals, as indicated in the above extract from its opinion, is that the "adjusting of dissimilar circumstances and conditions to their business"—that is, the determination of the *extent* to which discrimination is justified by such circumstances and conditions—should be left to the "traffic managers" of the carriers. This is in effect the same position as that contended for before the Commission by counsel for the carriers in the case of the *Freight Bureau* v. *Cinn., N. O. & T. P. R. Co. et al.* (6 I. C. C. R., 238), namely, that "once a substantial dissimilarity of circumstances and conditions appears, *that fact takes the whole situation entirely out of the operation of the" law.* The circuit court of appeals also quotes with approval the same rule as laid down by the circuit court in its opinion in this case as follows:

"The conditions are not the same and the circumstances are dissimilar, *so that the case is not within the statute.*" (Record, 124.)

The Commission in the case *supra* replied to this as follows:

"This position is manifestly untenable. It is in effect a claim that a substantial dissimilarity of circumstances and conditions is, even after due allowance has been made therefor, a license to a carrier to go further and give undue preferences and practice all the other forms of unjust discrimination denounced by the statute. In *Haworth* v. *Northern Pac. R. Co.*, 3 Inters. Com. Rep., 857, 5 I. C. C. Rep., 234, it is held that the law forbidding unjust discrimination 'applies even in cases

where a departure from the "long and short haul rule" of the statute is shown to be authorized, and the right, if established, of making the greater charge for the shorter haul, does not justify a disparity in rates so great as to result in unjust discrimination;' and in the case of *The Manufacturers & J. Union* v. *Minneapolis & St. L. R. Co.*, 3 Inters. Com. Rep., 115, 4 I. C. C. Rep., 79, the rule is laid down that "relative equality is necessary in the degree of similarity."

This is the correct rule. If carriers are left to determine the amount or extent of the discrimination the circumstances and conditions in a given case justify, then they may practice extortion and unjust discrimination *ad libitum*. If "carriers are better qualified to adjust such matters *than any court or board of public administration*," then they are better qualified to pass upon the reasonableness of a given rate established by them and upon all the other matters confided by the law to the courts and the Commission. This position of the court virtually makes the carrier judge in his own case. *Nemo debet esse judex in propria causa.*

If carriers were free from the human infirmity of bias in favor of their own interests, and their judgment was otherwise faultless in these matters, then there was no necessity for the act to regulate commerce. Congress, however, did not take that view of it; could see in the history of the business of common carriage no reason why carriers should be exempt from the rule that "no man should be judge in his own case," and enacted the law. This law confided the determination of these matters, in cases of dispute, to impartial tribunals—the courts and the Commission.

In the case of a party sued for a debt, it might be said that the debtor, being personally cognizant of the facts relating to his own indebtedness, was better qualified than any court or jury to determine its amount. The doctrine laid down by both the courts below in the above extracts from their opinions in this case, if applied to all legal controversies, would result in

the abolition of courts. We can only look for this after the advent of the millennium.

In the proviso to section 4 of the law it is expressly enacted that the Commission may "from time to time" prescribe the *extent* of the discrimination justifiable in case a departure from the rule of the law is authorized, as follows:

"The Commission may from time to time *prescribe the extent* to which such designated common carrier may be relieved from the operation of this section of the act."

(*e*) *"Southern Railway and Steamship Association" and traffic managers.*

The circuit court of appeals in its opinion makes the following statement in reference to the "Southern Railway and Steamship Association" and the traffic managers of the roads:

"The competition of railway lines is not stifled, but is fully recognized, *intelligently* and *honestly* controlled and regulated by the Traffic Association in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent or under the bias of any personal preference for Montgomery or prejudice against Troy that has led them, or is likely to lead them, to unjustly discriminate against Troy."

There is no evidence which bears directly on the honesty, intelligence, and freedom from bias of the association and the traffic managers, *unless it be the rates themselves which they have established.*

Those rates, as heretofore shown, discriminate against Troy to such an extent as to rebut any presumption which might be indulged in favor of the fairness and intelligence of those by whom they were established and put the burden upon the carriers of proving that they are not unjustly discriminatory.

The only other evidence bearing upon the intelligence and fairness of the Southern Railway and Steamship Association in regulating rates to different points is that of Mr. Vandeveer, a witness for the roads, who states that in 1886 the rates to

Montgomery *were so high*, as compared with those to Mobile, that the Montgomery merchants appealed to the association for a reduction, and, this appeal being "unheeded," they, being "*compelled to have relief in order to maintain their business*," established a boat line on the Alabama River, and by this means obtained from the association *partial* relief. (Record, 289.) This *partial* measure of relief was granted by the association *under compulsion*. This circumstance indicates a want either of intelligence or fairness in the association in its adjustment of rates between different localities.

In view of this state of the proof, it is difficult to understand upon what the court bases its statement eulogistic of the Southern Railway and Steamship Association in the above quotation from its opinion.

The fact that there is no positive proof of bias on the part of the traffic managers of the roads against Troy and in favor of Montgomery, is not a circumstance which the court should have considered in passing upon the justice or injustice of the admitted discriminations against Troy in favor of Montgomery. *Malice* is not a necessary ingredient of the charges against the roads. *If it were it might be inferred from the extent of the discriminations.*

VII.

THE ORDER OF THE COMMISSION IS PRIMA FACIE LAWFUL—BURDEN ON THE CARRIER TO SHOW ITS UNLAWFULNESS—THEY HAVE NOT DONE SO.

The order of the Commission is to be held as *prima facie* lawful. The maxim "*omnia presumuntur rite esse acta donec contraria apparentur*," which is invoked in support of the official acts of public officers, tribunals, and administrative boards, applies with full force to an order of the Interstate Commerce Commission, which is a bureau, tribunal, or administrative

board of the Government established by the law of the land. The Commission has made out a *prima facie* case for the enforcement of its order by establishing the issuance of the order and its violation by the defendants. Neither is controverted, but, on the contrary, is expressly admitted. The burden is therefore upon the defendants to *show clearly* to the satisfaction of the court that the order is unlawful and should not be enforced. To raise a mere doubt will not be sufficient. In the case of *Missouri Pacific Railway Co.* v. *Texas and Pacific Railway Co.* (31 Fed. Rep., 862), Judge Pardee says:

> "Whether in any particular case there is that competition on the long haul that will justify a lower charge for the long haul than is charged for the short haul under otherwise similar circumstances and conditions must be determined on the facts of the particular case, *keeping in mind that, where the matter is not clear, the object and policy of the law should prevail.*"

Conceding for *argument's sake* that some dissimilarity of circumstances and conditions has been shown which would justify rates relatively somewhat lower to Montgomery than to Troy, the question arises what is the extent of that dissimilarity, and whether under this order the Commission has not made sufficient allowance for such dissimilarity. The mere fact of dissimilarity, as shown in Part VI of this argument, does not justify any amount of discrimination the carrier may see proper to indulge in. The discrimination must be in proportion to the dissimilarity. "Relative equality is necessary in the degree of similarity." (4 I. C. C. R., p. 79.) The defendants (upon whom the burden is) have given no data either as to the extent of the dissimilarity or as to the amount of discrimination which it justifies. How, then, can the court hold that the *prima facie* presumption in favor of the lawfulness of the order has been rebutted? It may be safely affirmed that no circumstances or conditions have been proven which authorize discrimination to the extent shown by the facts admitted in this case.

VIII.

THE VICE IN THE THROUGH RATES FROM CINCINNATI, LOUISVILLE, AND ST. LOUIS TO TROY IS THE CHARGE OF THE LOCAL RATE FROM MONTGOMERY TO TROY AS A PART OF THAT THROUGH RATE—A RATE REASONABLE AS A LOCAL RATE ON A STRICTLY LOCAL HAUL, EXCESSIVE AS A PROPORTION OF A THROUGH RATE—LOCAL HAULS MORE EXPENSIVE TO CARRIER THAN THROUGH HAULS—STATE RAILROAD COMMISSIONS ONLY PRESCRIBE RATES ON LOCAL INTRASTATE HAULS—EVIDENCE AS TO REASONABLENESS OF RATE FROM MONTGOMERY TO TROY AS A LOCAL RATE IRRELEVANT—NO EXTRA EXPENSE FOR PORTION OF HAUL FROM MONTGOMERY TO TROY.

(*a*) *Vice in the through rates from the West to Troy.*—The Commission, seeing the great disparity between the through rates from the West to Troy, on the one hand, and Montgomery and Columbus, on the other, in order to diagnose the case intelligently, dissected the through rates to Troy, and discovered that the disease was located in that part of the through rate which was charged for the portion of the through haul from Montgomery to Troy. On this point the Commission say:

"The through rates to Troy are based on the Montgomery rates, and in making them Montgomery is treated as a 'trade center' or 'basing point,' and Troy as a local. This is conceded on the part of the defendants. The vice in the through rate to Troy, if any, arises from this fact and from the *consequently greatly disproportionate charge for the haul from Montgomery to Troy*, when compared with that from Louisville and the West to Montgomery." (Report of the Commission, p 13, and Record, p. 63.)

In other words, the "vice in" or illegality of the through rate arose from the charge as a part of it *of the local rate from Montgomery to Troy.* (What is said above and hereinafter as to the charge of a local as part of a through rate on shipments

from the West to Troy is applicable to the charge of the local from Troy to Montgomery as part of the through rate on cotton shipped from Troy to New Orleans, the subject-matter of *charge 6*.)

A rate reasonable as a local rate for a local haul, unreasonable as a proportion of a through rate.—The Commission held that the cost of local hauls to the carrier being much greater than on long through hauls, and local rates being consequently much higher per mile than through rates, the charge of a local rate as a proportion of a through rate was *prima facie* excessive. I read as part of my argument what the Commission say in this connection:

"Through rates, it is true, are not required to be made on a strictly mileage basis, but mileage is as a general rule an element of importance and 'due regard to distant proportions should be observed in connection with the other considerations that are material in fixing transportation charges.' The cost of the service in railway transportation is the expense of the two terminals and the intermediate haul. The terminal expenses remain the same without reference to the length of the haul. A local rate covers the expenses of both terminals, but a division of a through rate allotted to either of the terminal carriers of the through line can only embrace the expense of one terminal, and because of this difference in expense, among other reasons, local rates are made, as a general rule, much higher in proportion to the length of haul than through rates or any division thereof. A local rate, which presumably is adopted as covering both the initial and final expenses of the haul, is *prima facie* excessive as a part of a through rate over a through line composed of two or more carriers." (Record, p. 60.)

The roads have introduced evidence sustaining this position of the Commission—in other words, evidence showing that the cost to the roads on local hauls is many times greater per mile than on through hauls. The testimony on this point is given by W. J. Haylow, master of transportation of the Alabama Midland Railway Company. Comparison is made by him of the expense per ton of *local traffic in less than carloads* on certain trains with the expense per ton on *carload through freight*

on certain other trains on that railway. It is the carload through freight the transportation of which is shown to be many times less expensive than the local. (Testimony of W. J. Haylow, Record, pp. 268–269.)

The through freight to Troy is shown by the evidence to be in *carloads*. (B. M. Talbot, third direct interrogatory, Record, p. 223.)

(*b.*) *Testimony as to reasonableness of proportion of through rate from Montgomery to Troy relates to it as a local rate.*—It is manifest that a rate may be reasonable as a local rate for a *strictly local haul* and unreasonable and excessive as a proportion of a through rate for a through haul. Theodore Welch, at that time general freight agent of the Louisville and Nashville road, a witness for the roads, testified that the proportion of the through rates received by the Alabama Midland and Georgia Central roads from Montgomery to Troy were reasonable, but on cross-examination he stated that he was "basing his opinion upon the rates *considered as local rates*." He says:

"In saying in my answer to the direct interrogatories that the proportion of the through rates received by the Alabama Midland and Georgia Central railroads for transportation from Montgomery to Troy is reasonable, *I am basing my opinion upon the rates considered as local rates*." (Fifth cross-interrogatory, Record, p. 280.)

To the same effect is the testimony of W. P. Shelman, traffic manager of the Georgia Central and Savannah and Western Railroad Companies and a witness for the roads. He says:

"In relation to the proportion of through rates received by the Alabama Midland and Georgia Central railroads between Montgomery and Troy on business from Louisville, Cincinnati, and St. Louis, they are based on the *local rates* of the Alabama Midland, which is the short line between Montgomery and Troy, the long line accepting the same proportions. In speaking of these rates as reasonable in my answer to the direct interrogatories, *I did so with reference to that fact*." (Fifth cross-interrogatory, Record, p. 331.)

(c) *Claim that proportions of through rates from Montgomery to Troy are reasonable because not higher than local rates prescribed by Alabama railroad commissioners.*—The roads have introduced a number of witnesses, who testify that "the proportions of the through rates between Montgomery and Troy are reasonably low, because they are not higher than the rates allowed between Montgomery and Troy by the Alabama railroad commission." (W. F. Shelman, fifth direct interrogatory, Record, p. 330; Lee McLendon, seventeenth direct interrogatory, Record, p. 352.)

The State railroad commission has no jurisdiction over rates on interstate traffic, and the witnesses for the roads testify that the "railroad commission of Alabama does not undertake to prescribe or regulate through rates on interstate traffic, or the proportion of such through rates charged for that part of such through hauls of such traffic as may be in the State. (Theodore Welch, sixth cross-interrogatory, Record, p. 281; B. Dunham, sixth cross-interrogatory, Record, p. 274; W. F. Shelman, sixth cross-interrogatory, Record, 331.)

The rates prescribed and approved by the State commission are the *local* rates between Montgomery and Troy. All the voluminous testimony introduced for the purpose of showing the reasonableness of these rates as local rates is irrelevant. Their reasonableness as local rates on local hauls is not in issue—it is only their reasonableness as parts of through rates for through hauls that is questioned.

(d) *No extra expense shown justifying increase of rates on continuation of haul from Montgomery to Troy—Burden of proof.*—The Commission, in commenting on the charge of a local from Montgomery to Troy as a part of the through rate from Louisville, Cincinnati, St. Louis, and the West to Troy, further says:

"The evidence does not show what the expense at Troy is,

but the relatively disproportionate charge for the haul and expense between Troy and Montgomery casts the burden on the carrier of justifying it, and hence of showing what the expense is. It is a matter lying peculiarly within the knowledge of the carrier. In the case of *McMorran* v. *Grand Trunk Railway Co. of Canada* (2 I. C. C. Rep., 252) it is said: 'The evidence does not show with any precision what these several expenses (terminal, among others) are. * * * The defendants assume in their brief that the burden of showing these expenses was upon the petitioner; but this assumption is altogether erroneous. It would impose on persons conceiving themselves aggrieved by carriers a difficult and onerous rule of evidence. It would be impossible for the petitioners to show such facts otherwise than by the defendants' agents, and it was clearly the province of the defendants to make them appear. No presumption arises that a rate is reasonable from the mere fact that it has been put in effect; and when it is prima facie disproportionate or relatively unequal, the onus is on the carrier to justify its charges when challenged on these grounds. The knowledge of the justifying circumstances and conditions relied on is peculiarly in possession of the carrier.'" (Record, pp. 60–61.)

The rule laid down above that where rates are *prima facie* disproportionate or relatively unequal, the knowledge of the justifying circumstances being peculiarly in the possession of the carrier, the *onus* is on the carrier to justify its charges by making proof of such justifying circumstances, is manifestly correct. The defendants were thus challenged, or put upon notice, to prove the extra expense or other circumstance or condition incident to the continuation of the haul from Montgomery on to Troy, which authorized the great increase in the through rate for that portion of the through haul. They have wholly failed to do so. The extra expense, if any, would be the expense of transfer at Montgomery (if such transfer was made) from the cars of the Louisville and Nashville road to those of the Alabama Midland or Georgia Central, and the excess, if any, of the terminal expenses at Troy over those at Montgomery.

The evidence is positive that there is no such transfer. The

testimony of B. M. Talbot (third direct interrogatory, Record, 223) is that—

"Freights from Ohio River points to Troy all come in carloads, and it would not be necessary to transfer from car to car at Montgomery. It *comes to Troy in the original car in which it is loaded at the initial point.*"

Theodore Welch testifies (fourth cross-interrogatory, Record, 280):

"On through shipments from Louisville, Cincinnati, and St. Louis to Troy *via* Montgomery, in case of carloads, as corn, flour, meat, etc., *freight would go through to Troy in the same cars in which it is brought to Montgomery;* at least that is the general rule."

J. S. Corcoran, agent for the Alabama Midland road at Troy, after stating that his "testimony is based upon his observation and experience in the line of his duties as agent," testifies:

"If transfers were made at Montgomery, it would be shown on the freight bill; and these freight bills, as a general thing, do not show that such transfers have been made at Montgomery, but indicate that *the cars have come through.*" (Third direct and first cross interrogatories, Record, 233. Other witnesses to the same effect.)

As to terminal expenses at Troy.—On this point B. Dunham, superintendent of the Alabama Midland Railway, testifies (fourth cross-interrogatory, Record, p. 273):

"On through shipments from Louisville, Cincinnati, and St. Louis to Troy and Montgomery, respectively, I don't think there is any difference between the terminal expenses at Troy and those at Montgomery."

W. J. Haylow, master of transportation of the Alabama Midland road, testifies (latter part of answer to fourth cross-interrogatory, Record, p. 270):

"There is a difference in the terminal expenses at Troy and those at Montgomery, those at Montgomery being greater on

account of the larger force to be maintained for handling the freight, billing, switching, and inspecting, all of which does not have to be done at Troy."

The testimony of a number of other witnesses is of the same import. The witnesses, of course, refer to the expense per a given amount of traffic, as on account of the greater volume of business to Montgomery the aggregate expenses there must exceed those at Troy. Mr. Dunham certainly knew this.

The defendants have shown, therefore, no justifying circumstances arising from extra expense or in any way connected with the service of transportation between Montgomery and Troy. *They in fact make no such claim. Their sole plea is competition.* (The same is true as to through shipments of cotton from Troy *via* Montgomery to New Orleans, the subject-matter of *charge 6.*)

IX.

ERROR OF CIRCUIT COURT OF APPEALS IN HOLDING IN EFFECT THAT THE THROUGH RATE FROM THE WEST TO TROY IS REASONABLE BECAUSE THE PROPORTION OF THAT THROUGH RATE CHARGED FOR THAT PART OF THE HAUL EXTENDING FROM MONTGOMERY TO TROY IS REASONABLE AS A LOCAL RATE.

It is to be borne in mind that this case concerns through rates only; that a through rate, no matter how composed, is an entirety. As said by the Commission in the case of the *Georgia Railroad Commission* v. *The Clyde Steamship Company et al.* (5 I. C. C. R., 370).

"The total rate for through carriage over two or more lines, whether made by the addition of established locals or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority. How the rate is made is only material as bearing upon the legality of the aggregate charge. * * * *The*

reasonableness of the added local, as a local rate, is not under consideration in a case where the rate complained of is the *total charge* over different lines."

(*a*) The circuit court of appeals states as one of the grounds upon which it bases its decision that—

"The rates in question when *separately considered* are not unreasonable or unjust." (Record, 418.)

The rates referred to are, doubtless, the components of the through rates from the West to Troy—namely, the proportion of those rates charged for the haul to Montgomery and the proportion charged for the continuation of the haul on from Montgomery to Troy.

The inference of the court is, that if the components of a through rate be *separately* reasonable, the total through rate must be reasonable.

This is plausible, but will be perceived to be fallacious as applied to this case, when it is considered that the proportion of the through rate for the haul from Montgomery to Troy is the local rate established for a strictly local shipment originating at Montgomery and terminating at Troy, and *the testimony as to its reasonableness is only that it is reasonable as a local rate. There is no evidence showing, or tending to show, that it is reasonable as a proportion of a through rate.* (See Part VIII of this argument.)

The distinction between through and local rates is recognized in the case of the *Chicago and Northwestern Railway Company* v. *Osborne* (52 Fed. Rep., 912), in which the decision was rendered by Mr. Justice Brewer. He says:

"A through tariff on a joint line is not the standard by which the separate" (local) "tariff of either company is to be measured or condemned."

If this be true, as it unquestionably is, then the converse proportion for which we contend is equally true, namely, that

a local rate of one member of a through line is not the measure of what its proportion of a through rate should be for the same haul.

X.

MONTGOMERY, SINCE THE ADVENT OF RAILROADS, NOT A DISTRIBUTING POINT AS TO TROY—ERROR OF CIRCUIT COURT IN HOLDING THAT THE HAUL FROM THE WEST TO TROY CONSISTS OF TWO DISTINCT HAULS, A THROUGH HAUL TO MONTGOMERY PLUS A LOCAL HAUL FROM MONTGOMERY TO TROY, AND THAT, THEREFORE, THE CHARGE OF A LOCAL RATE FOR THE LATTER IS JUSTIFIABLE.

(*a*) It appears, as found by the Commission, that "the through rates to and from Troy are based on the Montgomery rates, and in making them Montgomery is treated as what is called a '*trade-center*' or '*basing point*,' and Troy as a local point." (Report of Commission, Record, p. 63; answer to fifth cross-interrogatory, Record, p. 281.)

This "trade-center" or "basing-point" system of rate making exists only in the South, and will be discussed at length hereinafter in Part XI of this argument.

It is claimed that "trade centers" are entitled to rates which discriminate in their favor and against smaller surrounding localities. The only plausible ground upon which this claim can be based is that they are *natural distributing points* for such localities. Being such natural distributing points, the traffic would come from points of origin to them as reservoirs in the first instance, and then be distributed to surrounding localities. As in that case there would be two distinct hauls—one a through and one a local—a reason might exist for charging a through rate for the long haul to the distributing point or reservoir and a comparatively high local rate for the short haul thence to the point of consumption.

Before railroads were built to Troy, Montgomery may have been a distributing point as to Troy, or a source of supply of goods to the Troy merchant. It does not appear, and it is not reasonable to suppose, that there were then through rates to Troy. The consignor at Cincinnati, for instance, could not get a through *water and wagon or rail and wagon rate* and a through bill of lading to Troy. Goods were consigned from the point of origin to the Montgomery merchant, were delivered to him at Montgomery, were bought from him by the Troy merchant, and hauled in wagons to Troy. Montgomery might properly, under those circumstances, be claimed to have sustained toward Troy the relation of a distributing point.

But such is not now the case. *The railroad does not stop at Montgomery, but goes on to Troy. If the river had gone on via Montgomery to Troy, Montgomery would never have been a distributing point as to Troy. The Troy merchant buys his goods direct from Louisville, Cincinnati, St. Louis, and the West, or Baltimore, New York, and the East* (answer to second cross-interrogatory, Record, p. 255), and they are shipped through to Troy, under a through bill of lading, naming an aggregate through rate, without stoppage or delivery to anyone at Montgomery. The haul is a through haul in carloads, the cars in which the goods are originally shipped passing through to Troy.

(*b*) *A fundamental error in decision of the circuit court is the finding that the continuity of the through haul from the West to Troy is broken at Montgomery.*—The theory of the court below appears to be that Montgomery even as to through shipments to Troy is a distributing point as to Troy; whereas Montgomery can occupy that relation to Troy only where the shipment is to Montgomery in the first instance and delivery is made there, and the goods are then reshipped to Troy. In that case

the shipment to Montgomery would be a through shipment terminating at Montgomery under a through rate, and the shipment from Montgomery to Troy a local shipment at a comparatively high local rate.

As to shipments *via* Montgomery to Troy, Montgomery does not occupy the relation of distributing point to Troy. If so, Birmingham and every point the cars pass before reaching Troy would be distributing points as to Troy. The fundamental error, as we respectfully submit, in the decision of the circuit court is the finding that under the evidence the haul in cases of shipments from the West to Troy is a through haul to Montgomery plus a local haul on to Troy. The court says on this point:

"The evidence shows that in cases of transportation of property from Northwestern points (such as St. Louis, Cincinnati, or Louisville) to Troy, Ala., the shipments come to Montgomery and from there to Troy; that the rate is so much from the shipping points to Montgomery; that the Alabama Midland Railroad charges what is called the local rate from Montgomery to Troy, and this is complained of." (Record, p. 123.)

The idea of the circuit court evidently is that the shipments are not continuous shipments through or by way of Montgomery to Troy, but that there are two shipments—first, a through shipment terminating at Montgomery, and then a local shipment from Montgomery to Troy. We think the evidence is to the contrary—that of the witnesses for roads as well as those for the complainant.

B. M. Talbot, a wholesale grocery merchant at Troy, testifies:

"When class goods are shipped from Louisville, Cincinnati, St. Louis, and other Ohio River points *via* Montgomery to Troy, *they are shipped on a through bill of lading to Troy at an aggregate through rate.* Freight from Ohio River points to Troy *all come in carloads, and it would not be necessary to transfer from car to car at Montgomery; it comes to Troy in the original car in which it is loaded at the initial point.*" (Answer to third interrogatory, Record, pp. 223–224.)

Charles Henderson, also a wholesale grocery merchant at Troy, testifies:

"When class goods are shipped from Louisville, Cincinnati, and St. Louis *via* Montgomery to Troy, *they are shipped under a through bill of lading and for an aggregate through rate.* There is no transfer of such freight at Montgomery from the cars in which it is brought to that city to the cars on the road of the Georgia Central or Alabama Midland companies, but the car containing such freight is transferred from one road to the other, unless the through car is disabled, and then the transfer is made from the disabled car at the station at which the disabling occurs." (Third direct interrogatory, Record, p. 228.)

J. B. Corcoran, agent for the Alabama Midland Railway at Troy, testifies:

"When class goods are shipped from Louisville, etc., to Troy *via* Montgomery, they are shipped under a through bill of lading at an aggregate through rate." (Third direct, Record, p. 233.)
"I have never had any class goods shipped from Louisville, Cincinnati, and St. Louis, or other Ohio River points *via* Montgomery to Troy for my individual account, but in the line of my duties as agent have handled the bills of lading on such shipments, and have observed that the through rate on such shipments was specified in the bill." (First cross, Record, 233.)

Theodore Welch, general freight agent of the Louisville and Nashville Road, testifies:

"On through shipments from Louisville, etc., to Troy *via* Montgomery in case of carloads, as corn, flour, meat, etc., the freight would go through to Troy in the same cars in which it is brought to Montgomery. At least this is the general rule." (Fourth cross, Record, 280.)

The evidence of many other witnesses is to the same effect, and there is none to the contrary.

(*c*) The ruling of the circuit court and the claim of counsel for the roads that the haul from the West to Troy is broken in two at Montgomery and consists of a through haul to Montgomery and a local haul from Montgomery to Troy, is

doubtless based upon the fact that the proportion of the through rate from the West to Troy charged for the haul from Montgomery to Troy is the local rate between those points. The haul is *physically*, so to speak, and in fact a through and continuous haul to Troy, without change of cars, under a through rate and through bill of lading, but it is claimed that the charging as a part of the through rate of the local rate from Montgomery to Troy *ipso facto* changes the nature of the haul or breaks the continuity of the haul at Montgomery and makes it a distinct local haul from Montgomery to Troy, and justifies the charge of the comparatively high local rate. In other words, the position is that the charging of the local rate as a proportion of the through rate makes the haul a distinct local haul, and, being thus made a distinct local haul, the high local rate is justifiable. *This is simply setting up the wrong in justification of the wrong.*

(*d*) *Social Circle Case.*—In *Cincinnati, New Orleans and Texas Pacific Railway* v. *Interstate Commerce Commission* (162 U. S., 193), known as the "Social Circle Case," this court held that when goods are "shipped under a through bill of lading from a point in one State to a point in another," the continuity of the haul is not broken by the terminal carrier of the through line charging its local for the portion of the haul over its road.

(*e*) *The policy of the law favors the continuity of hauls.*—The law favors if it does not expressly enjoin the *continuity* of hauls. This is apparent from section 7 of the act to regulate commerce, which is as follows:

"SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, express or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices the carriage of freights from being continuous

from the place of shipment to the place of destination;" and "no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and oeing treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intention to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act."

The Commission in their report and opinion in this case, in commenting on this section of the law, say (Record, p. 54):

"The continuity of the haul is not broken in fact and can not be broken in law by one or more carriers, members of a through line, charging local rates as their proportion of a through rate. If the continuity of the carriage may not be thus interrupted, can the exaction of local rates exempt the carrier from liability under the law by placing him in the attitude of a strictly local carrier? If this be conceded, the most vital provisions of the law may be readily evaded and nullified. For instance, a terminal carrier, part of a continuous through line, could elect to charge on through traffic its local to one or any number of stations on its road and a less through rate to stations beyond, and no violation of law could be alleged, because as to the short haul the carrier would not be subject to the act. The charge of a local rate and declaration by a carrier that as to through transportation to certain points on its road it is a local carrier can not alter the fact. The law regards the substance of things, and a palpable device for evasion of the law will not be allowed to accomplish its purpose."

XI.

TRADE-CENTER SYSTEM OF RATE MAKING—IT PREVAILS IN THE SOUTH ALONE—INTERSTATE-COMMERCE LAW (PARTICULARLY FOURTH SECTION) AIMED AT THIS SYSTEM—ITS DISASTROUS EFFECTS ON THE COUNTRY AND ON THE ROADS.

(*a*) The relatively high rates from and to Troy from all directions, as compared with those from and to Montgomery, result largely if not exclusively from the fact that they are established

in pursuance of what is known as the "TRADE-CENTER" or "basing-point" system of *rate making*. (Record, pp. 63, 281.)

When railway managers determine to make a locality a "trade center" or "distributing point" they do so, of course, by giving it advantages in rates over surrounding points, the object being to induce such surrounding points to procure their goods and supplies from the "trade center" or "distributing point" and not from the point of origin of the traffic. The roads thus secure the transportation of the traffic not only to the trade center, but back again or on to the local points at the comparatively high local rates.

This is done, as in the case of shipments from Ohio River points to Montgomery and through Montgomery to Troy, by making comparatively low through rates to the "distributing or basing point" (Montgomery), and charging as part of the through rate from that point on to a point beyond (like Troy) the comparatively high local rate; or, as in case of shipments of cotton *from* Troy *via* Montgomery to New Orleans, by charging the local rate from Troy to Montgomery as a part of the through rate from Troy to New Orleans; or, where the shipments are from the East to Troy and through Troy to Montgomery, by charging to the shorter-distance point (Troy) a rate equal to the through rate to Montgomery, plus the local rate back to Troy.

Under this system the merchants in the localities surrounding the "distributing point" or "trade center" can be undersold at their very doors, and they can get their goods at the same rate from the "distributing point" as from the point of origin of the traffic. The tendency, if not a necessary result, of this is that surrounding localities are made tributary to the "distributing or basing point," and the territory in which they are located is spoken of as territory of such point.

The growth of localities surrounding "trade centers" is retarded, if not entirely prevented, under this system of discrimination, and the "trade centers" and their commercial establishments become comparatively large and flourishing. The circuit court in its opinion lays stress upon the fact that Troy is a city of only 4,000 or 5,000 population and not "a large distributing point" as compared with Montgomery, and the circuit court of appeals states as a material matter that the "volume of population and business at Montgomery is many times larger than it is at Troy." *This is citing the disastrous effect of the discrimination against Troy as a justification of it.* In reply, we say, in the language of Judge Cooley:

"If the discrimination has existed and has had its *effect*, the fact that large establishments have thereby been encouraged is no reason why the injustice should be perpetuated." (*In re* L. & N. R. R. Co., I. C. C. R., p. 31.)

I quote below in full, as a part of this argument, what Judge Cooley says about the *Southern trade-center system* of *rate making* in the case *supra:*

"The preeminence of such trade centers in the territory (the South) reached by the petitioner's road is peculiar, and has probably been increased by the concessions in rates which the railroads have made to them, while making less concessions or none at all to less important stations. This condition of affairs tends to perpetuate itself, and the disparity of rates as between competitive and noncompetitive towns—the former, being the 'trade centers,' must have *had some influence to increase steadily the disparity in growth and prosperity.*

"By some of the witnesses before us this was bitterly complained of, while by others it was defended as being best for both classes of towns. The smaller towns in this part of the country, it was said, are dependent on the trade centers for their supplies, and they get, indirectly, the benefit of low rates to the distributing points in lower prices than could otherwise be given to them. In proportion also as the distributing points are prosperous they can and do extend to the dealers at other points credit and indulgence. *The prevalence of such ideas and the acting upon them in making freight tariffs give to railroad managers a power of determining within certain limits what*

towns shall be trade centers and what their relative advantages; and while it may be, as they assert it is, that in deciding upon rates under the pressure of the competition of trade centers they endeavor to do justice between them, yet as they do not at the same time feel a like pressure from noncompetitive points, it is obvious that justice to such points is in great danger of being overlooked; and it is altogether likely that it is so to some extent.

"*One result is that towns recognized by railroad managers as trade centers come to be looked upon as towns of special privileges,* and other towns strive for recognition as such and complain, perhaps, of injustice when they fail. It was made very clear by the evidence produced in behalf of the railroads that the exceptionally favorable rates which were given to certain localities were in some cases given to build up trade centers, and as they had had that effect and large establishments had been located at such centers, invited by the favoring rates, it was urged that there would be injustice in now compelling the roads to go back to the rule of equality. Of this it may be said, *first*, that as between different localities it is no sound reason for discriminating in favor of one as against another that the purpose is to build up the favored locality as a trade center; and, *second, if the discrimination has existed and has had its effect, the fact that large establishments have thereby been encouraged is no reason why the injustice should be perpetuated.* This statute aims at equality of right and privilege not less between towns than between individuals, and it will no more sanction preferential rates for the purpose of perpetuating distinctions than of creating them."

(*b*) *The greater charge for the shorter than the longer haul over the same line prevailed only in the South under the trade-center system of rate making at the time the act to regulate commerce was enacted. Hence, the long and short haul rule of the fourth section was aimed at that system.*

The third section of the act also prohibits the *giving of one locality* an undue or unreasonable preference or advantage over another locality.

In *Martin et al.* v. *Chicago, Burlington and Quincy R. R. Co.* (2 I. C. C. R., pp. 46, 47) Judge Cooley, in speaking of the act as it relates to the "trade-center" system of *rate making*, says:

"But a fatal difficulty with the theory that a trade center, as

such, is entitled to specially favorable rates is found in the fact that it is in conflict with the spirit and purpose of the act to regulate commerce. One of the reasons for the passage of that act was that by means of rebates and other contrivances large towns and heavy dealers secured advantages which gave them a practical monopoly of the markets and shut out the small towns and dealers. * * * * * * * * *

In contemplation of a law which was enacted in the interest of equality between large and small interests, there can be no unjust discrimination in giving to large and small towns relatively equal rates. It is not a matter of the least importance, in a legal sense, that the small towns are strictly local and noncompetitive. If, under relatively equal rates, they can elevate themselves to the class of jobbing towns, it is their right to do so; but if not, they are still entitled, as against any action of this Commission, to have the benefit of such favorable rates as do not unjustly discriminate against others."

In a recent decision by the Supreme Court of the United States in a case brought up from the United States circuit court for the district of Colorado (*Union Pac. R. Co.* v. *Goodridge*, 149 U. S., 680, 37 L. ed.), *Mr. Justice* Brown, in speaking of the purpose of the Colorado act under consideration as being the same as to *intra*state commerce as that of the act to regulate commerce as to *inter*state commerce, says very forcibly that it was designed "to cut up by the roots the entire system of rebates and discriminations in favor of *particular localities*, special enterprises, or favored corporations," and pertinently refers to the fact that carriers being dependent upon the will of the people for their corporate existence are "bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put al their patrons *upon an absolute equality*" (citing *Schofield* v. *Lake Shore & M. S. R. Co.*, 42 Ohio St., 571; *Sanford* v. *Catawissa, W. & B. R. Co.*, 24 Pa., 378; *Messinger* v. *Pennsylvania R. Co.*, 36 N. J. L., 407; *McDuffee* v. *Portland & R. R. Co.*, 52 N. H., 430).

The "trade-center" or "basing-point" system of *rate making* is spoken of by Mr. Aldace F. Walker, who was then a member

of the Interstate Commerce Commission, and is now, we believe, high authority in railway circles, as being *peculiar to the South*, and he mentions Montgomery, among others, as one of such favored localities. Theodore Welch speaks of the system as prevailing "especially in the Southern States" (Record, p. 281). That this system is peculiar to this section of the country is a well known fact. In a case before the Commission (3 I. C. C. R., pp. 24, 25, 46, 47, 48, 49) in which the tariffs and classifications of the Atlanta and West Point and other Southern railway companies were under investigation, Mr. Walker says:

"And it is also peculiarly true that long-established usage has here created a system of so-called 'trade centers,' which control the collection and distribution of commodities throughout the territory in their vicinity, a course of business which has become so firmly grounded that the territory surrounding the local centers is frequently spoken of as naturally tributary to them.

"Previous to the passage of the act to regulate commerce it was the universal custom in this section of the country to establish rates to certain basing points, subject to the fluctuations occasioned by competition and otherwise, while rates to and from all other points were obtained by adding the local charges of the various terminal or initial roads to the rates at the basing points." * * *

"While this method was satisfactory to the centers which it created and maintained, the smaller towns and rural communities protested against a system which worked so obviously to their disadvantage. Since the passage of the act the number of these favored localities has decreased in the Southern States, and upon many of the lines the disparity in rates as between them and intermediate or local stations has been diminished." * * *

"The belief has forced itself upon this Commission with increasing strength during the period in which it has observed the operation of various systems of rate making in the Southern States and elsewhere that this system of combined joint and local rates to points in the Southern States intermediate to the so-called basing points is in a very great degree responsible *for the lack of local development in that region, except at favored localities.*" * * *

"They say that the railroads must live or there can be no commerce by rail, and they insist that any reduction of rates means loss of revenue, which is against the public interest and

the carrier's right, unless the rate in question be unreasonable *per se*. But it is not clear that the application of the general rule of the law would involve permanent loss of revenue. *The stimulus given to business at intermediate points will increase traffic largely. That proposition has been so often practically demonstrated that no intelligent observer can reject it.* * * *

"At present the amount shipped to intermediate points is relatively very small. Giving such points the rates charged at more distant places, if adopted and maintained as a general principle, would necessarily encourage local industries and enterprise. Such encouragement would not be at the expense of the coast points, but would in its reflex action and by necessary laws ultimately work in their favor also."

From these quotations it appears to be the opinion of Mr. Walker, *first*, that the "trade-center" or "basing-point" system of rate making is to a very great degree responsible for the lack of local development in the South except at favored localities; *secondly*, that by reason of an increase of traffic to local points resulting therefrom an abandonment of this system would not involve permanent loss of revenue to the roads, and, *thirdly*, that the localities now favored as trade centers would not be injured, but rather benefited, by abolishing this system of rate making, because the encouragement by relatively fair rates to local points of local industry and enterprise would, in the language of Mr. Walker, "in its reflex action and by necessary laws ultimately work in favor of such trade centers also."

As the "trade-center" system of rate making does not prevail in the North or other sections of the country, where commercial centers and railways have attained the highest degree of prosperity, it is a fair inference that that system is not essential to their prosperity in the South.

To sum the matter up, "honesty" or fair and impartial dealing "is the best policy" for railway corporations as well as natural persons, and will result in benefit to both the carriers and their patrons. Rates to all localities, large and small, should be established upon a basis fairly remunerative to the

roads, with no relative inequality as between those localities. To allow carriers to depart from this rule will be to give them unlimited license to nullify at will the remedial provisions of the statute, and will open wide the door to all the evils which it was enacted to suppress. Carriers are transcending the limits of their legitimate sphere of action as *public servants, dependent upon the will of the whole people for their corporate existence*, when they undertake to charge one locality or portion of the people more than another for a less or the same service, with a view to equalizing commercial conditions as between rival markets or because of the exigencies of competition between themselves.

XII.

EXCUSES FOR THE PREVALENCE OF THE TRADE-CENTER SYSTEM OF RATE MAKING AND DEPARTURES FROM THE LONG AND SHORT HAUL RULE IN THE SOUTH AND NOT IN THE NORTH.

In explanation of the fact that the *trade-center* or *basing-point system of rate making* does not prevail in the North as in the South, counsel for appellees states (see Mr. Baxter's printed argument in circuit court, p. 12), *first*, that—

"The trade centers in the North are so near together that it is *impossible for the railroads to charge higher rates to intermediate local stations than to competitive stations beyond*."

And *second*, that—

"*The volume of local traffic in the North is so much larger than it is in the South* that the Northern railroads are not compelled to make concessions, which Southern roads are forced to make in order to get competitive traffic."

In placing the alleged necessity for the trade-center or basing-point system of *rate making* in the South on the latter ground the roads are pleading the baneful effect of the system as an

excuse for it. One reason why "the volume of local traffic in the North" *as compared with through or competitive traffic* "is so much larger than in the South" is the fact that local stations in the North are given rates relatively equal to those to the large trade centers, while in the South local stations are discriminated against in favor of such trade centers. If this discrimination were done away with, the so-called necessity for it would no longer exist.

The testimony is that the competitive traffic of the Alabama Midland road for the year ending June 30, 1893, was nearly equal to its noncompetitive or local traffic—($152,862.33 as against $174,588.43).

(McLendon, direct 13, Record, p. 352.)

While, as stated in Mr. Baxter's printed argument in the circuit court, "the competitive traffic of the Pennsylvania Railroad, though large, amounts to but an insignificant percentage of the total business."

The great difference in this respect between these two roads is significant, and is undoubtedly due, in part at least, to the fact that the Alabama Midland road discriminates against its local traffic to local stations in favor of competitive traffic to trade centers and the Pennsylvania road does not.

The prosperity of a road must be more dependent upon the general prosperity of communities or stations along its entire line than upon that of a few widely separated trade centers or distributing points. We believe that, not only as stated by Mr. Walker (*supra*), is this "system of combined joint and local rates to points in the Southern States intermediate to the so-called basing points responsible for the lack of local development in that region, except at favored localities," but that it has also contributed largely to the depressed financial condition of the Southern roads themselves. A policy on the part of the roads of discrimination, the natural effect of which is to increase the

already great natural advantages of large commercial centers and to correspondingly retard the growth and depress the business interests of local stations, is suicidal.

XIII.

ALLEGED ERROR OF THE COMMISSION IN FAILING TO DISTINGUISH BETWEEN "NATURAL TRADE CENTERS" OR BASING POINTS ON THE SEACOAST OR NAVIGABLE RIVERS, AND THOSE ARBITRARILY CREATED BY RAILROAD OFFICIALS AT RAILROAD JUNCTIONS.

Counsel for the roads contends that the Commission errs in failing to distinguish between "natural trade centers" and those arbitrarily created by railroads.

The Commission does not condemn "natural trade centers" as such. It condemns the *system of rate making* illustrated in this case, under which the natural advantages of such centers over surrounding localities, by reason of their location on navigable streams and bodies of water, are increased by undue and unreasonable preferences and advantages in rail rates. The roads in doing this are misapplying the Scripture: "To him that hath shall be given, and from him that hath not shall be taken away even that which he hath." Practically, Troy is removed more than four times her natural distance from the river by the rates from the West.

The fact that large cities—in other words, natural trade centers or distributing points—have existed always and before railways came into operation is evidence that railways and preferential rates are not essential to their existence and prosperity. It also appears, from the fact before mentioned, that cities flourish in the North and other sections where the Southern trade-center system of *rate making* has not prevailed, that that system is not essential to their prosperity.

XIV.

THE CLAIM ON THE PART OF THE ROADS THAT DISCRIMINATION AGAINST TROY IS JUSTIFIED BECAUSE OF THE ALLEGED FACTS THAT MONTGOMERY, COLUMBUS, AND EUFAULA WERE TRADE CENTERS BEFORE RAILROADS WERE BUILT, AND THAT TROY WAS THEN DISCRIMINATED AGAINST. THE TRUE MISSION OF RAILWAYS IS TO DO AWAY WITH DISCRIMINATION AGAINST INLAND TOWNS. TROY A COMPETITIVE POINT.

In his printed argument filed in the circuit court counsel for the roads says:

"All three of these" (Montgomery, Eufaula, and Columbus) "were 'trade centers' and 'basing points' long before a mile of railroad existed on the face of the earth. * * * They were important 'trade centers' in those early days, and their prominence over adjacent interior towns, such as Troy, *was far greater then than now*. Troy was then, as now, a local, non-competitive point." (Mr. Baxter's argument in circuit court, pp. 10, 11.)

And again:

"*Of course there is a discrimination in favor of Montgomery and Eufaula as compared with Troy in the matter of rates, but this discrimination has always existed*, and in no sense has it been created or increased by the railroads. On the contrary, the *railroads have diminished the discrimination to the exact extent of the difference between the wagon rates which formerly prevailed and the rail rates which now prevail to and from Troy.*" (Mr. Baxter's argument in circuit court, p. 11.)

1. In the first place, there is no evidence whatever to sustain these statements. If the court will judicially know that Montgomery, Columbus, and Eufaula, being situated on rivers, were commercial or "trade centers" before railroads come into operation, it can not know that their "prominence over adjacent interior towns, such as Troy, was far greater then than

now;" that discrimination against Troy "has always existed," and "that the railroads have diminished the discrimination," etc. *These are pure assumptions.*

2. If the discrimination against Troy existed before railroads were built, this is *no justification for its continuance.* If the fact of the prior existence of an evil is ground for its perpetuation, there can be no progress or reform. The act to regulate commerce was designed to eradicate the discriminations which were in existence at its passage, *whether new or old.*

The position of counsel for the roads is *antiprogressive.* It is, or should be, the *mission* of railways to remove the disadvantages to which inland towns away from rivers were subjected before railways came into operation. *The railways have done this in the cases of Atlanta, Birmingham, Anniston, Opelika, Meridian, and a number of other cities in the South, which are not located on rivers or navigable bodies of water.* In Georgia, before rail lines were built to Atlanta, it was a struggling village, and Augusta, Savannah, and Columbus (river towns) were the principal cities and trade centers; and in Alabama, before rail lines were built to Birmingham, there was no Birmingham at all, and Mobile, Montgomery, and Selma (river towns) were the principal trade centers. The railways have wrought the change, and this, we repeat, is their true mission.

3. The statement that "the railroads have diminished the discrimination against Troy to the *exact extent of the difference between the wagon rates which formerly prevailed and the rail rates which now prevail to and from Troy,*" is not authorized by any proof in this case.

Concede that wagon rates from Montgomery to Troy were higher than the rail rates now are, and it does not establish the proposition that the roads *have diminished discrimination.*

It must further appear that the wagon rates to Troy were a larger percentage of the water rates to Montgomery than the rail rates to Troy are of the rail rates to Montgomery.

Can the court know this judicially? *Can the court know that before the roads were built to Troy and Dothan goods could be reshipped from Montgomery and carried in wagons through Troy, 68 miles beyond, to Dothan, at an aggregate rate from point of origin of 26 cents a hundred pounds ($5.20 per ton) less than the aggregate rate from point of origin at which they could be reshipped from Troy to Dothan?* This is what counsel for appellees call upon the court to know judicially. *If the court will know anything on the subject in the absence of proof, it will know the reverse* of what seems so improbable.

In order to sustain the statement that the roads have diminished the discriminations against Troy, which it is alleged existed before the advent of railroads, *proof should have been made:*

(*a*) Of what water rates to Montgomery were before railways came into operation.

(*b*) Of what wagon rates from Montgomery to Troy were.

(*c*) That the wagon rates were *more than from four to seven times* as high per mile as the water rates.

Before the advent of railways the water routes had a practical monopoly of the business of public carriage on long hauls, as the former now have. *The presumption is, that the water rates were then much higher than now.* The court will *know this judicially*, if it will know anything on the subject in the absence of proof.

4. The statement that the "prominence of Montgomery, Eufaula, and Columbus over adjacent interior towns, such as Troy, was far greater before railroads were built than now," is contrary to the fact.

It is well known that before the advent of railroads Montgomery had a population of not over 3,500. She now claims between 35,000 and 40,000. Troy before the roads were built was a flourishing inland town, the county seat of Pike County, a county of a large and prosperous white population, and then had a population of at least 600. It is now about 4,000. Troy before the time of the railroads was therefore about one-sixth the size of Montgomery. It is now not more than *one-tenth*.

5. *Troy a competitive point.*

(*a*) The statement that "Troy was then" (before the era of railroads), "*as now*, a local noncompetitive point," is not only not supported by any proof, but is contrary to the evidence of the witnesses for the roads. That evidence shows that Troy is now a competitive point—that is, *a point for the carriage of traffic to which different lines of transportation compete or may compete.*

Troy is at the intersection of two roads. The two roads, the Alabama Midland and Georgia Central, which reach Troy, connect at one point or another not far distant from Troy with all the lines, whether all rail or rail and water, running from northeastern cities to Montgomery, and also with the lines from Louisville and other Ohio River points to Montgomery and Columbus. E. B. Joseph, a witness for the roads, testified that "either of these roads at Troy has all the connections with points of the Plant system and the Central of Georgia." (Answer to fifteenth direct interrogatory, Record, p. 301.)

To the same effect is the testimony of T. H. Moore (answer to fifteenth direct interrogatory, Record, p. 221), H. M. Hobbie (answer to sixteenth direct interrogatory, Record, p. 298), and J. H. Clisby (answer to fifteenth direct interrogatory, Record, p. 304).

Unless their rates are established by agreement there is com-

petition between the Alabama Midland and Georgia Central and all the lines with which they are connected for traffic to Troy. From Cincinnati and the West goods may be brought to Troy by the lines *via* Chattanooga and Columbus, as well as by the lines *via* Montgomery, and from the East they may come to Troy by the *all-rail* lines *via* Atlanta, Montgomery, and other points, as well as by the sea and rail lines *via* Charleston and Savannah. (For a detailed statement of the lines by which traffic may be brought to Troy see Record, p. 55.)

All these lines have through rates to Troy as well as to Montgomery.

The roads have introduced testimony to the effect that because the small village of Ozark is on an extension of the Georgia Central road known as the "Ozark Extension," and also on the Alabama Midland road, it is a competitive point. (Answer of J. W. Nail to third cross-interrogatory, Record, p. 246. To the same effect is the testimony of Charles B. Goldthwaite, third cross-interrogatory, Record, p. 250; Joel D. Murphree, third cross-interrogatory, Record, p. 259; H. B. Cowart, third cross-interrogatory, Record, p. 267.)

If the comparatively small town of Ozark is thus made a competitive point, how can it be said that Troy is not?

(b) Counsel for the roads now admits that Troy is a competitive point.

In a supplemental brief (pp. 6, 7, filed in the circuit court of appeals by counsel for the roads, after the statement that "the defendants do not pretend to offer the slightest justification" for the higher rates to Troy than to Montgomery, "*except the solitary fact of competition at the longer-distance point,*" Montgomery, the question in the case is stated to be "*whether the competition at the long-distance point*" (Montgomery) "*is so dissimilar from the competition of the short-distance point*" (Troy) "*as to justify the rates charged,*"

This is an admission that Troy is a competitive point and is a marked departure from the position theretofore maintained. The contention up to this time on the part of counsel and of railroad officials examined as witnesses for the roads has been that Troy was a strictly "*local, noncompetitive point*" on the Alabama Midland Road, and *that has been the main ground upon which the charge of local rates between Montgomery and Troy as a part of through rates from the west has been sought to be justified.*

As we have seen, the court below, in its opinion, places the haul from Montgomery to Troy, on a through shipment from the West to Troy, on the same footing as that of a local shipment originating at Montgomery and terminating at Troy as a local station. (Record, top p. 124.)

XV.

TROY DOES NOT SEEK ADVANTAGES IN RATES OVER LOCALITIES IN HER VICINITY, AS INTIMATED IN THE OPINION OF THE CIRCUIT COURT.

In the opinion of the circuit court it is said:

"It is common knowledge, it is history, that Montgomery was a distributing point before the railroad system was known and when there were no trunk lines, such as we now have, competing for a share of her business. Troy is a city of about 4,000 or 5,000 population, with two railroads, one of which has but recently been built. It is not a large distributing point" (*and, it may be added, never will be under existing rates*), "and it is not on any navigable water course. The complaint would *almost* seem to be that the railroad companies had not made her a basing point; and that Montgomery, west of her on the Alabama River, and Columbus, east of her on the Chattahoochee River, being basing points, this operated to her prejudice as a business point—*which it no doubt does*—and this is perhaps her real cause of complaint." (Record, p. 122.)

The court, it will be observed, does not charge Troy squarely with *the audacity of* claiming the advantages enjoyed by

Montgomery and Columbus as basing or distributing points—the court hesitates to impute such badness to Troy—but says that Troy's complaint "would *almost* seem to be that the railroad companies had not made her a basing point."

There is nothing in the complaint or evidence indicating a desire on the part of Troy to be made a basing point and given advantages in rates over the localities around her. Her complaint is that undue and unreasonable preferences and advantages in rates are given her competitors in business, Montgomery and Columbus, which, as the court states, "*operate to her prejudice as a business point.*"

The merchants and business men of Troy all testify that if Troy is given rates relatively equal to the Montgomery and Columbus rates, and this should result in a revision of the rates to the localities immediately around Troy, so as to make them "correspondingly low" or relatively equal to the Troy rates, Troy will still be benefited.

Charles Henderson, a wholesale grocery merchant at Troy, testifies:

"If a change of rates as prayed for to the Interstate Commerce Commission should result in the revision of rates to Ozark, Dothan, Brantley, Searight, and the other named stations, so as to make the rates to those places correspondingly low, the effect would be to benefit my business and the business of Troy to such intermediate stations and the territory around Troy on the lines of the Georgia Central and the Alabama Midland Company. It would be better for the business of Troy than the present rate if the rates to Troy were put on the same basis with Montgomery rates, and if at the same time the rates to Union Springs, Brantley, Luverne, Ariosto, and other points on the M. & G., the M. & E., and Alabama Midland railroads should also be upon the same basis, and would benefit them for the reason that Troy's strongest competitors are Montgomery and Columbus, which enjoy rates that Troy does not, and under the new rates Troy would be on an equal footing with those points." (Answer to third cross-interrogatory, Record, p. 231.)

Oliver C. Wiley, president at one time of the Alabama Midland road and now a manufacturer of cotton-seed oil and fertilizers at Troy, testifies:

"If a change of rates as prayed for by the board of trade of Troy to the Interstate Commerce Commission should result in the revision of rates to Dothan, Ozark, Brantley, Searight, and other intermediate stations, so as to make the rates to such intermediate stations correspondingly low, the effect on my business and the business to these stations and the territory around Troy on the lines of the Alabama Midland and Georgia Central would be to allow us to reach these points in Troy's territory upon an equal footing with Montgomery and Columbus. As rates now stand they are in favor of Montgomery and Columbus. To a certain extent it would help the intermediate stations and the territory around by giving them a lower rate of freight from the East and West. At many of these points the buyers are small and they would still trade at Troy, Montgomery, or Columbus, and in this event Troy would stand an equal showing in selling them as Columbus or Montgomery." (Answer to third cross-interrogatory, Record, pp. 254-255.)

To the same effect is the evidence of all the other witnesses examined on this point.

XVI.

TROY A DISTRIBUTING PORT, BUT NOT A "LARGE ONE," SAYS THE CIRCUIT COURT.

The court below, it will be noted in the above extract from the opinion, lays stress upon the fact that "Troy is a city of" only "about 4,000 or 5,000 population, with two railroads," and "is not a large distributing point"—that is, as compared with Montgomery and Columbus. It is conceded that Troy is a "distributing point," but it is held that, being small in comparison with her rivals in business, Montgomery and Columbus, she is not entitled to be placed on a basis of relative equality with them. This appears to be a recognition of *the*

policy of the roads to build up large towns, large interests, and large dealers at the expense of the small.

It is incredible that such a policy should receive indorsement from any source in this country and under a statute like the act to regulate commerce, which, to use the forcible language of Justice Brown in *Union Pacific Co.* v. *Goodridge* (149 U. S., 680), heretofore quoted, was designed "to cut up by the roots the entire system of discrimination in favor of *particular localities*, special enterprises, or favored corporations," and under which carriers are "bound to deal fairly with the public," upon whose will they are dependent for their corporate existence, "and to put all their patrons upon an *absolute equality*."

It would seem to follow, if Montgomery and Columbus are entitled to preferential rates as to the comparatively large territory of which they claim to be distributing centers, that Troy (though she does not make the claim) would be, also, in respect to the territory as to which she is a distributing point.

It is a matter of surprise that Troy is a distributing point to any extent under the prejudice and disadvantage to which she is subjected in the matter of rates. Her growth and size, hampered as she is by rates preferential to her competitors, are remarkable.

Oliver C. Wiley testifies:

"There are about 83 mercantile houses in Troy. There is only 1 strictly wholesale merchant, but from 5 to 10 merchants do a mixed wholesale and retail business, and the rest are retail only. The bulk of the groceries are bought in the West, and some dry goods and clothing are bought in Cincinnati, and the bulk of the dry goods and light groceries are bought in the East. The volume of trade of Troy annually is $3,400,000. My answer to the volume of trade of Troy per annum is based partly upon my personal knowledge, partly upon data collected by the Board of Trade of Troy, of which

board I am a member. There were between 35,000 and 40,000 bales of cotton received in Troy during the year 1893. There are the following manufacturing enterprises now in the city of Troy: Oil mill, fertilizer factory, acid chamber, ice factory, cotton mill. The number of hands employed by these manufacturing enterprises is about 250. The industrial enterprises of said town have an invested capital as follows: Troy fertilizer works, with $150,000 capital, employing about 100 hands; compress, with $50,000 capital, employing about 25 hands; water and electric-light works, with a capital of about $475,000, employing 25 hands; cotton mills, with about $40,000 capital, employing about 50 hands; ice factory, with $10,000 capital, employing about 5 to 10 hands; 2 planing mills, capital invested about $25,000, employing about 25 hands; furniture factory, with $5,000 invested, employing from 5 to 10 hands; 6 cotton warehouses, capital invested about $30,000, employing about 30 hands; machine shop, with a capital invested of about $10,000, employing about 10 hands; 2 cotton ginneries, with a capital invested of about $10,000, employing about 20 hands, and 2 hotels, capital invested about $25,000, number of hands employed unknown." (Answer to second cross interrogatory, Record, p. 254.)

This is a wonderful showing for an *inland* town, surrounded by powerful competitors to whom preferential rates are given. It shows great inherent power, which the roads have failed to entirely neutralize, and gives an idea of what Troy might do with relatively fair rates.

XVII.

COMPARISONS OF WAGON RATES WITH RAIL RATES WHOLLY VALUELESS AS SHOWING THE REASONABLENESS OF THE LATTER.

From the fact that wagon rates between Montgomery and Troy before the building of a railroad to Troy were probably higher than the rates established by the rail lines, counsel infers the reasonableness of the latter.

Comparison of a rail rate with a wagon rate for the purpose

of showing the reasonableness of the rail rate is wholly valueless, for the following among other reasons:

1. Where a wagon or cart carries one ton of freight, a railroad carries thousands.

2. Where a wagon or cart carries freight one mile, a railroad carries it hundreds or thousands of miles.

3. Wagons and carts have no monopoly of transportation over a particular roadway.

When railways came into operation, however, they superseded other modes of transportation and obtained a practical monopoly as to hauls of any length. They have an absolute monopoly over their own roadbeds, whereas public highways for vehicles are free to all. It is this monopoly which, both in England and this country, has called for legislation regulating their rate charges. In the case of the *Attorney-General* v. *B. & D. J. Ry. Co.* (2 Eng. Railway and Canal Cases, pp. 132, 133) the Lord Chancellor said that the object of Parliament in its several enactments for the regulation of railways and their charges was to prevent "those who should get the monopoly of the carriage of the public from exercising that monopoly to the prejudice of individuals." Our act protects *localities* as well as individuals. (Section 3, act to regulate commerce.)

4. Railroads operate under charters derived from the public granting them rights of way and other exclusive franchises, and hence, as said by Justice Brown in *Union Pacific Company* v. *Goodridge* (149 U. S., 680), are bound to deal fairly with the public upon whose will they are dependent for their corporate existence.

There is no analogy whatever between transportation by rail and transportation in wagons and carts. The circumstances and conditions in the two cases are substantially dissimilar.

XVIII.

CONSIDERATIONS WHICH LED THE COMMISSION TO PRESCRIBE RATES FROM LOUISVILLE, CINCINNATI, AND ST. LOUIS TO TROY NOT IN EXCESS OF THOSE NOW IN FORCE FROM THOSE CITIES TO COLUMBUS AND EUFAULA—AVERAGE RECEIPTS PER TON PER MILE, ETC.

The rates from Louisville, Cincinnati, and St. Louis, respectively, to Columbus and Eufaula are the same. The Commission in its order requires that the rates from those cities to Troy shall not exceed those to Columbus and Eufaula. (It is in this way that the rates to Eufaula are involved in this case.) The attention of the court is asked to the following statement by the Commission of the considerations upon which this portion of its order is based. After reaching the conclusion that the rates to Troy were too high the Commission says:

"The question remains to be determined what the rates to Troy shall be. In arriving at a conclusion on this point no light is furnished by proof of cost of service or other matters proper to be considered in determining what rates are just and reasonable from the standpoint both of the carrier and shipper. If there is an expense incident to the continuation of the through haul to Troy, which calls for and justifies exceptional rates, the burden, as we have seen, is upon the carrier to show it. The roads, however, do not claim that there is anything in the nature of the service of transportation to Troy which justifies the disproportionate rates charged to that city, but base their defense of those rates on another and distinct ground (which we hold not to be established), namely, dissimilarity of circumstances and conditions resulting from water and rail competition at Montgomery. In the absence of proof of exceptional conditions, the transportation from Montgomery to Troy, including terminal expenses, will be presumed to be not more costly to the carrier than for like distances in the same or like territory. On examination we find that the class rates from Louisville, Cincinnati, and St. Louis, and Ohio River points generally, are the same to Columbus, Eufaula, and

Opelika. The distances from Louisville and St. Louis to Columbus by the shortest available route (that via Birmingham and Opelika over the Columbus and Western road) are 9 miles greater, and by the routes via Montgomery are about 42 miles greater than to Troy. The distance from Cincinnati to Columbus by the shortest route appears to be about 14 miles less than to Troy. The distances to Eufaula are greater than to Troy, and to Opelika they are somewhat less. The distances from the cities named to Columbus and Eufaula being on the average greater than to Troy, and other things being equal, the rate to Troy should, if anything, be slightly less than to those cities. No substantial dissimilarity of circumstances and conditions justifying a higher rate to Troy has been attempted to be shown. The class rates in cents per hundred pounds (except Class F, which is per barrel) to Columbus, Eufaula, and Opelika, and to Troy from Louisville, and the excess of the Troy rates over those to Columbus, Eufaula, and Opelika, are given in the following table:

Classes	1	2	3	4	5	6	A	B	C	D	E	H	F
From Louisville to Columbus, Eufaula, and Opelika	107	92	81	68	56	46	28	36	29	25	50	55	50
From Louisville to Troy	140	130	113	95	75½	62	45	50	37	32	90	59	66
Excess of Troy rates	33	38	32	27	19½	16	17	14	8	7	19	4	16

* Per barrel.

"The excess of the Troy rate is the same under the rates from Cincinnati and St. Louis.

"The above rates to Columbus, Eufaula, and Opelika, if applied to Troy, yield the following rates in cents per ton per mile on the different classes:

Classes	1	2	3	4	5	6	A	B	C	D	E	H	F
Rate per ton, per mile	3.94	3.39	2.90	2.50	2.06	1.69	1.03	1.32	1.07	0.92	1.84	2.03	0.92

"These mile ge rates average on all the classes 1.97 cents, and are somewhat greater than are realized on the application of the same through rates to the hauls to Columbus and Eufaula. The above average of 1.97 cents and the above mileage rates on 8 out of the 13 classes are greater than the average receipts per ton per mile and estimated cost of carrying a ton a mile for the years ending June 30, 1891 and 1892, as reported by the Louisville and Nashville Railroad Company,

the Alabama Midland, and Georgia Central, and which are given in the following table:

Name of road.	1891.		1892.	
	Average receipts.	Estimated cost.	Average receipts.	Estimated cost.
	Cents.	*Cents.*	*Cents.*	*Cents.*
Louisville and Nashville Rwy. Co	0.968	0.614	0.918	0.621
Alabama Midland Railway	1.745	.900	1.356	1.400
Central Railroad of Georgia	1.529	1.012	.....	.....

"Columbus and Eufaula are located in or are contiguous to the territory in which Troy is situated, and the former, at least, is in active competition with Troy for business in the country immediately around Troy. We are of the opinion that the class rates to Troy from Louisville, Cincinnati, and St. Louis should be, at least, as low as those above given to Columbus and Eufaula."

AVERAGE RECEIPTS PER TON PER MILE, ETC.

It will be observed that there are *many* substantial reasons given by the Commission showing the justice and propriety of its conclusion, that the rates from the West to Troy should not exceed those to Columbus and Eufaula. Counsel for the roads, however, passing by the many weighty and unanswerable considerations leading to its action mentioned by the Commission in the above extract from its report, seek to fix the attention of the court upon the reference by the Commission to the fact that the average of the mileage rates under the rates prescribed for Troy is greater than the "*average receipts per ton per mile*" and "*estimated cost of carrying one ton a mile*" over the roads of the Louisville and Nashville, Alabama Midland, and Georgia Central Companies, as reported by them to the Commission for the years ending June 30, 1891 and 1892. They enter into a lengthy argument and take testimony to show that this data furnished by them annually to the Commission, and which they have from time immemorial made out at great trouble for their own use, is wholly valueless for any purpose.

They are driven to the necessity of discrediting their own statistics.

We deem it unnecessary to enter into a discussion of this question, further than to say that, while the "average receipts per ton per mile" on all traffic do not indicate with mathematical accuracy what is a reasonable rate in a given case, yet the fact that a rate yields a rate per ton per mile in excess of those average receipts is a *circumstance (in connection with others) showing or tending to show that that rate is a reasonably high and not an unreasonably low rate.*

However that may be, the other matters named by the Commission and upon which their action was mainly based fully justify that action.

XIX.

EVIDENCE INTRODUCED BY CARRIERS AS TO EFFECT OF A NAMED INCREASE OF RATES TO MONTGOMERY—IT ONLY SHOWS THAT EXCESSIVE RAIL RATES MAY DIVERT TRAFFIC TO WATER OR RAIL AND WATER LINES—ORDER OF COMMISSION CAN NOT BE COMPLIED WITH BY SUCH INCREASE.

Counsel for the roads filed the following interrogatories to a large number of witnesses:

"Interrogatory No. 9. Suppose the rail rates from New York to Montgomery should be increased as follows: On first class, 22 cents per 100 pounds; on second class, 19 cents per 100 pounds; on third class, 17 cents per 100 pounds; on fourth class, 16 cents per 100 pounds; on fifth class, 14 cents per 100 pounds; on sixth class, 12 cents per 100 pounds, what effect, if any, would it have toward inducing the shipment of such freight from New York to Mobile by ocean and thence to Montgomery by river? (Record, 193.)

"Interrogatory No. 10. Suppose the rail rates from Louisville, Cincinnati, and St. Louis to Montgomery were increased as follows: On first class, 42 cents per 100 pounds; on second class, 38 cents per 100 pounds; on third class, 35 cents per 100 pounds; on fourth class, 32 cents per 100 pounds; on fifth class, 23½ cents per 100 pounds; on sixth class, 21 cents per

100 pounds; on Class A, 17 cents per 100 pounds; on Class B, 19 cents per 100 pounds; on Class C, 13 cents per 100 pounds; on Class D, 12 cents per 100 pounds; on Class E, 21 cents per 100 pounds; on Class H, 26 cents per 100 pounds; on Class F, 26 cents per barrel, what effect, if any, would it have toward inducing the shipment of freight from Louisville, Cincinnati, and St. Louis to Mobile, and thence *via* steamboat from Mobile to Montgomery? (Record, 193.)

"Interrogatory No. 11. Suppose the rail rates on cotton intended for export and shipped from Montgomery to the Atlantic ports, Brunswick, Savannah, West Point, and Norfolk, should be increased 13 cents per 100 pounds, what would be the effect, if any, toward inducing the shipment of such cotton from Montgomery to Mobile by river and thence by vessel to said Atlantic ports (Brunswick, Savannah, West Point, and Norfolk), or by vessel direct from Mobile to European ports?" (Record, 193.)

The object of these interrogatories is, presumably, to show that if the rates to and from Montgomery were made as high as those to and from Troy the traffic to and from Montgomery would be diverted to the water lines, and hence that it is impracticable to do away with the relative inequality in rates as between those cities by advancing the rates to the latter.

Leslie Gilbert, secretary of the Commercial and Industrial Association of Montgomery, and a member of the law department of the Louisville and Nashville Railroad Company, a witness for the roads, answered that "*if the matter of time was not material to the merchants of Montgomery*" he thought the specified increase in rates would "increase the tonnage of traffic" by the water lines. (Answers to ninth and tenth direct interrogatories, Record, p. 294.)

George C. McCormick, a merchant of Eufaula, and witness for the carriers, testified that if the rates from Louisville, Cincinnati, and St. Louis to Eufaula were increased as supposed in the interrogatories, he did not think it would have the effect of inducing the shipment of freight by the water lines to Eufaula, "for the reason that *the increased expense, such as lighterage, transfer, and wharfage would more than counterbalance*

the difference in freight." (Answer to eighth direct interrogatory, Record, p. 340.)

The other witnesses for the roads, however, answered unqualifiedly that in their opinions the supposed increase of rates would divert the bulk of the traffic to the water lines *via* the Chattahoochee and Alabama rivers. Let it be conceded that this fact is established by the evidence, and what does it amount to? Only this, that excessive rates by the direct rail lines will drive the traffic to the indirect water and rail and water lines. Where rates, as in the case of those to and from Montgomery, are fixed by carriers and maintained for a long period of time, the presumption is that those rates are, in the opinion of the carriers, reasonably remunerative. This presumption rests upon the same principle as the presumption of sanity. Any arbitrary material increase of such rates, then, would render them more than reasonably remunerative—in other words, excessive.

Take the case of rates from Louisville, Cincinnati, and St. Louis to Montgomery, and compare them with the rates from those cities on a haul over the Louisville and Nashville Railroad through Montgomery, 180 miles farther on, to Mobile, shown in the table below:

Distances.	Classes.....	1	2	3	4	5	6	A	B	C	D	E	H	F
614 miles via M. & O., 805 miles via L. & N.)	From St. Louis to Mobile.	90	75	65	50	40	35	25	25	25	20	28	25	45
625 miles via L. & N.	From St. Louis to Montgomery.	126	115	98	77	64	51	35	39	31	25	56	43	54
669 miles via L. & N.	From Louisville to Mobile.	90	75	65	50	40	35	25	25	25	20	28	25	45
490 miles via L. & N.	From Louisville to Montgomery.	98	92	78	63	52	41	28	31	24	20	48	33	40
779 miles via L. & N.	From Cincinnati to Mobile.	98	83	73	54	44	39	28	27	27	22	31	28	49
600 miles via L. & N.	From Cincinnati to Montgomery.	108	102	83	71	59	47	32	33	26	22	52	17	44

(Record, p. 64.)

* Per barrel.

Assuming, as we must, that the rates to Mobile are reasonably remunerative, the much higher rates to Montgomery, the shorter haul by 180 miles, must be much more remunerative, and to increase them, as specified in the interrogatory, No. 10 *supra*, for instance, 42 cents, on first-class goods, would make them excessive, if not prohibitory; it would make the Montgomery first-class rate from St. Louis $1.68 as against a 90-cents rate to Mobile, a difference in favor of Mobile of 70 cents. *Under these rates goods could be shipped through Montgomery 180 miles farther on to Mobile, and then back up the river to Montgomery at a less rate than to Montgomery direct.* Can proof, that an increase of the rate to Montgomery to an extent that will make it manifestly exorbitant, if not prohibitory, will divert traffic to the river line, be held to justify the admitted discrimination in rates against Troy? That is the purpose for which this evidence is introduced—otherwise, it is irrelevant, and has no bearing whatever on the case. What is said as to the supposed increase of rates to Montgomery applies with equal force to such increase to Columbus and Eufaula.

The order of the Commission can not be complied with by an increase of the rates to Montgomery. It might be inferred from these questions to so large a number of witnesses as to the effect, in their opinion, of the increase of rates to the extent named in the interrogatories that the Commission had ordered such an increase of rates, or that the order of the Commission might be complied with by such an increase. The Commission has not ordered any increase of rates whatever to any point. It has only ordered a decrease or reduction in the rates to Troy. Nor can the order of the Commission be complied with by an increase of rates to Montgomery, Columbus, or Eufaula.

The order of the Commission prescribing the rates to Troy from Louisville, Cincinnati, and St. Louis is as follows:

"It is ordered that the roads participating in the traffic involved cease and desist from charging and collecting on class goods shipped from Louisville, St. Louis, and Cincinnati to Troy a higher rate *than is now charged* and collected on such shipments to Columbus and Eufaula." (Record, p. 69.)

This can not be complied with by an increase in the rates to Montgomery, Columbus, or Eufaula.

The order of the Commission prescribing the rates to Troy from the East is as follows:

"It is ordered that the roads participating in the traffic involved cease and desist from charging and collecting on class goods shipped from New York, Baltimore, and the Northeast to Troy a higher rate than is charged and collected on such shipments to Montgomery." (Record, p. 69.)

It may be that the latter subdivision of the order might be complied with by increasing the rates from the East to Montgomery to the extent named in the interrogatories, *but for the fact that such increase would render the rates excessive*, which is forbidden by section 1 of the law. It can not be assumed that the order of the Commission can be complied with by unlawful means—particularly when the natural and lawful method of reduction in the rates to Troy can be resorted to.

XX.

THE PLEA OF NECESSITY FROM A FINANCIAL STANDPOINT FOR THE PRESENT DISCRIMINATORY RATES TO TROY—THE RATES PRESCRIBED BY THE COMMISSION REASONABLY REMUNERATIVE.

The roads not only attempt, as above shown, to prove that the discriminations against Troy can not be obviated by an increase in the rates to Montgomery and Columbus, *but also that it is impracticable to give Troy relief by reducing the rates*

to Troy as ordered by the Commission, because the Alabama Midland Railway failed to make operating expenses for the *fiscal year from July, 1892, to June, 1893.*

(*a*) The year—July, 1892, to June, 1893—in which it is claimed the operating expenses exceeded the gross earnings of the road, is stated by witness McLendon, on cross-examination, to have been "*an exceptionally bad year*" *for the road.* (Answer to ninth cross-interrogatory, Record, p. 355.)

He is corroborated in this by W. J. Haylow, master of transportation of the Alabama Midland road. (Answer to ninth cross-interrogatory, Record, p. 271.)

McLendon was asked, on cross-examination, to give for the preceding year (1891–92) and for the following year (1893–94) statistics similar to those he had given for the exceptionally bad year (1892–93); and he replied that "he had not the information at hand necessary to give" such statistics. (Answer to eighth cross-interrogatory, Record, p. 355.)

It is to be presumed from this that records of the gross earnings and operating expenses of the road were only kept for exceptionally bad years, or else that the showing for the years inquired about would not benefit the road in this case.

The financial result of the operation of the road for a "selected year," which is shown to have been an exceptionally bad year for the road, is not a fair criterion of the result of the operation of the road in general, and does not even tend to sustain the plea of the defendants that the existing discriminations against Troy are essential to the maintenance of the road.

(*b*) This plea was insisted upon before the Commission. Their answer (see Report and Opinion of the Commission, p. 15; Record, p. 65) was in part as follows:

"Unjust discrimination as between localities or individuals

can not be essential to the business prosperity of the roads. On the contrary, we believe that in the end, if not immediately, their financial welfare would be promoted by the application in the matter of rate making of the principle of absolute fairness as between all interests, large and small, enjoined by the statute."

In other words, fair dealing can not, in the nature of things, fail to prove ultimately to be the best policy for the roads. Relatively equal rates to all points, large and small, instead of building up a few favored "trade centers" at the expense of surrounding localities, will tend to a distribution of prosperity, will increase the traffic to the comparatively small towns, and correspondingly increase the revenues of the carriers, and that, too, without detriment to the "trade centers." This commends itself to our reason as well as our sense of justice, is in accordance with the views (as we have shown) of able and impartial students of the question, and is supported by practical results in the North and other sections where our Southern "trade-center" system of rate making has not prevailed.

(*c*) Discrimination against *one* locality or station on a road is not justifiable because the *operations in general* of the road have resulted in loss.

(*d*) *The financial condition of a road is not the test of remuneration. No matter what the relation between its earnings and* ~~*receipts*~~, *the road has no right to charge the public more than reasonable rates.*

This proposition is laid down and enforced by this court in a recent opinion delivered by Mr. Justice Harlan in the case of *Covington and Lexington Turnpike Co.* v. *Sanford et al.* (decided December 14, 1896), as follows:

"*The rights of the public are not to be ignored.* It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. *But that involves an inquiry as to what is reasonable and just to the public.* * * * The

public can not properly be subjected to unreasonable rates, *in order simply that stockholders may earn dividends.* * * * If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the plaintiff's turnpike upon payment of such tolls *as in view of the nature and value of the service rendered by the company are reasonable* is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

(*c*) *The rates prescribed by the Commission will be reasonably remunerative.*—But it is difficult to understand why the rates prescribed by the Commission on through hauls from Louisville, Cincinnati, and St. Louis to Troy, which are the same as on such hauls to Columbus and Eufaula, should not be remunerative, in view of the fact, as shown in the report of the Commission, that those rates when applied to Troy yield a higher rate per ton per mile than when applied to Eufaula and Columbus. If the roads can be run on those rates to Columbus and Eufaula, why not to Troy? These rates to Troy prescribed by the Commission give also about the same rate per ton per mile as the rates to Montgomery and a higher relative rate, taking into consideration the fact that on shipments from the Ohio Troy is the longer-distance point, and also the rule that the rate per ton per mile decreases as the length of the haul increases. They yield also a very much higher rate per ton per mile than the rates to Mobile. If the roads can be run on a rate on *class 1 goods*, for example, of 90 cents per 100 pounds from Louisville to Mobile, why can they not be maintained on a rate of $1.07 per 100 pounds, the rate ordered by the Commission to Troy, the haul to Troy being 127 miles shorter than to Mobile? The rate per ton per mile to Troy, under the rates ordered by the Commission, is, furthermore, greater than the average receipts per ton per mile and the estimated cost of carrying a ton a mile for the years ending

June 30, 1891 and 1892, *as reported to the Commission by the Louisville and Nashville Railroad Company, the Alabama Midland, and Georgia Central.* (Report and Opinion of the Commission, Record, p. 65.)

The same is true as to the rates prescribed by the Commission from the East to Troy and from Troy on cotton to New Orleans and the South Atlantic ports.

XXI.

CHARGES 1, 2, 3, AND 6.

Charge 1.—As alleged in *charge 1*, the Alabama Midland and the Georgia Central Railway companies "charge and collect $3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields, and only $3 per ton on such shipments to Montgomery, the longer-distance point by both said roads, and all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland Company has to be hauled through Troy."

In connection with this and subsequent charges the fact must be borne in mind that the dissimilarity of circumstance or condition which will justify a departure from the rule of the statute must relate to the *particular commodity* or traffic in respect to which the disparity in rates is made. For example, water or rail competition to the longer-distance point or dissimilarity in the service of transportation over the line to the shorter and longer distance points, respectively, as regards *sugar*, would not justify a departure from the rule of the statute as to *nails*, and so those differentiating circumstances, if shown as to *class goods* from Northeastern cities, do not justify a greater charge on phosphate rock from South Carolina and Florida for the shorter haul to Troy than the longer haul to Montgomery. *There is no proof whatever of any dissimilarity*

of circumstance or condition, either as respects the actual service of transportation or arising from competition, which can differentiate the shipment of phosphate rock to Troy from such shipment to Montgomery.

The Commission in their report and opinion say in reference to the proof before them on this point (Record, p. 58):

"An attempt was made to show that some shipments of phosphate rock had been made from the Florida points, Ocala and Tampa (the latter on the Gulf coast), *via* Mobile and the Alabama River, to Montgomery, but the witness testified he had never known such shipments to be made; that he himself had 'tried to get a rate by that line to Montgomery and had been unable to get it,' and that he thought it impracticable, as 'the goods would have to be transferred at Mobile to get to Montgomery and then would have to be hauled to the works.'"

The findings of fact set forth in the report and opinion of the Commission are, as we have before stated, declared by the act to be *prima facie* evidence as to each and every fact found. The above finding, moreover, will be seen on examination to be in accordance with the testimony before the Commission which has been admitted in evidence in this case. (Record, p. 137.) *There is therefore no ground for refusing to enforce the order of the Commission in relation to charge 1.*

Charges 2 and 3.—The same is true as to charges 2 and 3.—As to charge 2, that a higher rate is charged on domestic shipments of cotton from Troy than from Montgomery, through Troy to the Atlantic seaports, Brunswick, Savannah, and Charleston, the Commissioner finds the facts to be (Record, p. 56) that—

"The rates in cents per hundred pounds on cotton from Troy and Montgomery, respectively, to these ports are:

To	Brunswick.	Savannah.	Charleston.	West Point.	Norfolk.
From—					
Troy	47	47	52	.....	.....
Montgomery	45	45	45	51	51

"When the complaint was filed, the cotton rate from Montgomery to Brunswick, Savannah, and Charleston was 40 cents per hundred pounds. It has since, as appears above, been raised to 45 cents, and the rate from Troy to Charleston has been raised to 52 cents."

The Commission finds in reference to charge 3 (Record, p. 58)—

"The evidence also sustains the allegation of the complaint that on shipments for export to the Atlantic ports, Brunswick, Savannah, West Point, and Norfolk from Montgomery and other localities within what is termed in the complaint "the jurisdiction" of the Southern Railway and Steamship Association, Montgomery and such other points are allowed, under the rules of that association, to ship through to Liverpool *via* any one of those ports at the lowest through rate *via* any of them at the date of shipment. In other words, at the lowest combination of inland and ocean rates from the interior point to the foreign market. This may result in a less through rate than the sum of the regular published tariff rail rate to port of transshipment and the ocean rate thence. For example, if at the date of shipment the regular rail rate to Savannah be 40 cents and the ocean rate from that port to Liverpool 53 cents, making a through rate of 93 cents, and the rail rate to Norfolk be 45 cents, and the ocean rate from that port to Liverpool 35 cents, making a through rate of 80 cents, Montgomery is allowed on a shipment *via* Savannah the latter rate of 80 cents, or 13 cents less than the sum of the regular inland rate to that port and the ocean rate on. This 13 cents is taken from the published inland rail rate to Savannah and not from the ocean rate. This privilege is denied to Troy, and the result is that on two shipments to Savannah for export made the same day, the one from Montgomery (the longer-distance point both over the Alabama Midland and the Georgia Central) and the other from Troy, the rate charged the Troy shipper is 45 cents and that charged the Montgomery shipper is only 32 cents. This discrimination would also exist between a shipment from any interior point consigned to the domestic port and one for export consigned to a foreign market."

There is no proof that any shipments of cotton, domestic or for export, have ever been made from Montgomery by water to the *South* Atlantic seaports—Charleston, Savannah, Brunswick, West Point, or Norfolk. Such shipments from Montgomery

are *via* Mobile to New Orleans or New York and *North*-eastern cities. Troy, through the Alabama Midland road and connections or through the Georgia Central and connections, has or should have the benefit of all the practicable rail lines to the South Atlantic ports. *There is no pretense of any material dissimilarity in the actual service of transportation from Troy and Montgomery, respectively, which can justify the higher rate from the shorter-distance point, Troy.*

Charge 6.—There is no excuse whatever shown for the exaction of the *local rate* from Troy to Montgomery on *through* shipments of cotton from Troy *via* Montgomery to New Orleans. This cotton is shipped under a through bill of lading and an aggregate through rate. What has heretofore been said as to the charge of a local rate from Montgomery to Troy as a proportion of the through rate from the West to Troy is applicable to *charge 6.*

XXII.

POWER OF THE COMMISSION TO PRESCRIBE MAXIMUM RATES IN A GIVEN CASE BEFORE IT.

1. *Not contended that Commission has authority to fix rates in the first instance.*

It is not contended in behalf of the Commission that it has authority under the act to regulate commerce to prescribe the rates of carriers in the first instance. That is the province of the carrier. Our position is in strict accordance with the rule laid down by the late Justice Jackson in the case of *The Interstate Commerce Commission* v. *Baltimore and Ohio Railroad Company* (43 Fed. Rep., 37), so often quoted by counsel for carriers, namely:

"*Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate* so as to give undue preference or advantage to

persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

If the rates established by carriers be just and reasonable under section 1 of the act to regulate commerce and not unjustly discriminatory under sections 2, 3, or 4, they do not come within the purview of that act, and the Commission has no authority in respect to their regulation.

When, however, rates have been established by carriers in the first instance, the question whether they are just and reasonable or not unjustly discriminatory—in other words, their lawfulness—may, under section 13 of the act, be *investigated* by the Commission, either on its own motion or on complaint made before it; and our contention is, where the reasonableness of the rates is the matter under investigation, that if they be found to be excessive or unreasonably high the Commission may, under sections 12 and 15 of the act, prescribe reasonable maximum rates.

(These sections of the act—12, 13, and 15—will be discussed further on.)

The power claimed for the Commission, then, is that of investigation of the lawfulness of rates established by carriers in the first instance, and, if they appear to be unlawful, the finding of what are lawful rates and the ordering of carriers to put the lawful rates in force.

2. *What this court holds in the Social Circle Case* (Cinn., N. O. and T. P. R. Co. et al *v.* Interstate Com. Com., 162 U. S., 184).

The *circuit court* made no finding as to the power of the Commission to prescribe rates. The *circuit court of appeals*

merely quotes *without comment* what is said on that subject by this court in the case known as the "Social Circle Case" (162 U. S., 184).

Counsel for the roads contends that in the "Social Circle Case" this court *unqualifiedly* denies power in the Commission to prescribe or "fix rates"—not only in the first instance, but also after due investigation on "issue made and facts found" in a given case.

We think this court in the Social Circle Case only denies to the Commission authority to itself fix rates in the first instance of its own motion and without a hearing of the parties to be affected, and that it expressly recognizes power in the Commission to prescribe reasonable rates after "issue has been made and the facts found" in a case before it.

We give below all this court said upon this subject:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to *itself* fix rates was mooted in the courts below, and is discussed in the briefs of counsel.

"We do not find any provision of the act that expressly, or by necessary implication, confers *such a power*.

"It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. *This is not necessarily so.* The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. *If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable.*"

At the outset, it will be observed, this court states the question to be—

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to *itself fix rates.*"

And then says:

"We do not find any provision of the act that expressly, or by necessary implication, *confers such power.*"

The words "such power" necessarily refer to the "power to *itself* fix rates."

What is meant by the "power to *itself* fix rates" is next clearly indicated by the following language:

"If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, *itself* fixes a rate, that rate is prejudged by the Commission to be reasonable."

The Commission, then, "itself fixes a rate" when it does so without "withholding judgment until an issue has been made and the facts found." This is the power which this court denies to the Commission, and the denial of this power is equivalent to saying that if the Commission does "withhold judgment until an issue has been made and the facts found" it has the power to fix a rate.

The vice denounced by this court is *prejudgment*. Prejudgment is judgment *pre*—before or in advance. Before or in advance of what? Of a hearing upon a full presentation of issues and of all material facts.

The repetition of the phrase "*itself* fix rates" and the use of the word "*itself*" are significant and can not be claimed to be meaningless. This court can not be charged with loosely and unnecessarily using a word of such grave import in this connection.

To "itself fix a rate" is the exercise of *legislative* power, whereas the function of the Commission in ascertaining and prescribing a reasonable rate is *quasi judicial*. This distinction is drawn by this court in *Texas and Pacific Railway Company* v. *Interstate Commerce Commission* (162 U. S., p. 197), known as the "Import Case." The opinion in that case as well as the "Social Circle Case" was rendered by Mr. Justice Shiras, and both were handed down by him at the same time. In the "Import Case" there is furnished an example of what is

meant by the power "to *itself* fix rates." In stating the facts, Justice Shiras says:

"It appears by the bill that on March 23, 1889, the Commission, *of its own motion and without a hearing of the parties to be affected*, had made a certain order wherein, among other things, it was provided as follows: 'Import traffic transported to any place in the United States * * * is required to be taken on the inland tariff governing other freight.'"

In this order the Commission, in the language of the court, "*of its own motion and without a hearing of the parties to be affected*," or, as said in the Social Circle Case, "*without withholding judgment until an issue had been made and the facts found*," fixed the same rates for the inland portion of the transportation of import traffic as were charged for the same inland haul on domestic traffic. In commenting on this order of the Commission fixing the inland rate on import traffic the court says:

"We do not wish to be understood as implying that it would be competent for the Commission, *without a complaint made before it, and without a hearing*, to subject common carriers to penalties. It is also obvious that if the Commission does have the power, of *its own motion*, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant *legislative* powers to the Commission."

Another illustration of a commission *itself* fixing rates is furnished by State railroad commissions, which frequently, under the authority given them by the State laws, establish schedules of rates without a hearing in a given case.

In his brief in the circuit court of appeals counsel for the roads contended that in the Social Circle Case the "Commission did not attempt to '*itself* fix rates' of its own motion and without a hearing of the parties to be affected."

If this be unqualifiedly true, then the Supreme Court was misstating the case when it defined the question to be

"whether Congress intended to confer upon the Interstate Commerce Commission the power to *itself* fix rates," and was indulging in a mere *dictum* when it said:

"If the Commission, instead of withholding judgment in such a matter until an issue shall be made and *the facts* found, *itself* fixes a rate, that rate is prejudged by the Commission to be reasonable."

This proposition, however, it can be demonstrated, is not dictum, and the language used by the court in stating it is apt, and expresses the exact situation as disclosed by the facts bearing upon the rate to Atlanta (the rate then under consideration) and the Commission's action in reducing that rate.

The words "*the facts*," used by the court, of course mean *all the material facts*. The fixing of a rate on a partial finding of facts, without the consideration of other material facts, would be to that extent prejudging the reasonableness of the rate and would not meet the requirement that "the facts" be found.

This was what the Supreme Court held the Commission did in the Social Circle Case in fixing the rate from Cincinnati to Atlanta at $1, when it had been $1.07, and it was upon this ground the court overruled that part of the Commission's order. The court says:

"It is stated by the Commission in its report that the only testimony offered or heard as to the reasonableness of the rate to Atlanta in question was that of the vice-president of the Cincinnati, New Orleans and Texas Pacific Company, whose deposition was taken at the instance of the company; and in acting upon the subject the Commission say:

"'This statement or estimate of the rate from Cincinnati to Atlanta ($1.01 per 100 pounds in less than carloads) we believe is fully as high as it may reasonably be, if not higher than it should be, but without more thorough investigation than it is now practicable to make we do not feel justified in determining upon a more moderate rate than $1 per 100 pounds of first-class freight in less than carloads. The rate on this freight from Cincinnati to Birmingham, Ala., is 89 cents, as compared with

$1.07 to Atlanta, the distances being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or, in fact, to warrant any substantial variance in the Atlanta and Birmingham rate from Cincinnati.'

"But when the Commission filed its petition in the circuit court of the United States, seeking to enforce compliance with the rate of $1 per 100 pounds, as fixed by the Commission, the railroad companies, in their answers, alleged that 'the rate charged to Atlanta, namely, $1.07 per 100 pounds, was fixed by active competition between various transportation lines, and was reasonably low.'

"Under this issue evidence was taken, and we learn from the opinion of the circuit court that, as to the rate to Birmingham, *there was evidence before the court which evidently was not before the Commission*, namely, that the rate from Cincinnati to Birmingham, which seems previously to have been $1.08, was forced down to 89 cents by the building of the Kansas City, Memphis and Birmingham Railroad, which new road caused the establishment of a rate of 75 cents from Memphis to Birmingham, and by reason of water route to the Northwest such competition was brought about that the present rate of 89 cents from Cincinnati to Birmingham was the result."

The ground upon which the Supreme Court refused to enforce the order of the Commission as to the Atlanta rate, it thus distinctly appears, *was not want of power in the Commission to fix a rate*, but that the Commission had fixed the rate without all the material facts and all the material issues having been presented to it.

If the Supreme Court had been of the opinion and had intended to hold that the Commission had no power to prescribe a rate in a given case after issue made and a finding of the facts, it would have so stated and would not have entered into a discussion of the facts presented to the Commission and to the court and would not have based its decision upon the ground that the Commission had acted without consideration of all the material facts and issues.

The language heretofore quoted as used by the Supreme Court in the Social Circle Case in reference to the power of the Commission

to fix a rate, follows the discussion of the facts upon which the Commission acted in fixing the Atlanta rate, and must have had direct reference to the action of the Commission in fixing the rate to Atlanta without having all the material facts before it.

3. *Explanation on the part of the carriers of the meaning of the word* "PREJUDGED," *as used by this court in the "Social Circle Case."*

In the case of the *Interstate Commerce Commission* v. *North Eastern R. R. Co. of South Carolina et al.* (circuit court of appeals, fourth circuit), counsel for the roads (Mr. Smythe) gives the following explanation or construction of the word "*prejudged*," as used by this court in the "Social Circle Case."

"Fixing a rate which has not been the subject of discussion and has not been put in issue, is '*prejudgment*.' For instance, the rate in the Social Circle Case, against which complaint was made, and which was under examination and discussion, was $1.07. There was no issue whatever about a $1 rate. That rate was not in issue. No question had been made as to it, nor any investigation had. When the Commission, therefore, after investigating the facts as to the rate of $1.07, went on and fixed the rate of $1, that was, as to this $1 rate '*prejudgment*,' before or in advance of a hearing upon a full presentation of issues, and of all material facts, because this $1 rate had never been in issue, and as to it no investigation had ever been made."

(*a*) This is an admission that, under the decision in the Social Circle Case, the Commission has the power to prescribe a rate in a given case if *the rate prescribed is put in issue.*

The question as to the unreasonableness of a given rate necessarily involves the question, What is a reasonable rate? *The latter is within the issue presented by the former.*

The position of counsel for the roads is no more tenable than would be the contention that, in an action at law for the recovery of a debt, only the amount specified in the plaintiff's

declaration could be recovered, and that a verdict or judgment for a less sum would be invalid because that particular sum was not named in the declaration.

(*b*) *The statute expressly recognizes the question as to what is a reasonable rate as being within the issue raised by the question as to the unreasonableness of a given rate by providing in section 15 that in case injury is shown to have been sustained by anyone from an unreasonable rate charge under investigation, the Commission may award reparation for such injury. This involves the necessity of fixing the amount of the reparation, which can only be done by determining what is a reasonable rate, the amount of reparation being the difference between a reasonable rate and the excessive rate exacted.*

If what is a reasonable rate is not within the issue raised by the question whether a given rate is reasonable or unreasonable, then the awarding of reparation would be an act of prejudgment.

(*c*) Again, a rate is unreasonable or unjust only when it deviates from the standard of reasonableness or justice. It may therefore be said to be logically and practically impossible to determine a given rate to be unreasonable or unjust until there has first been an ascertainment of what is a reasonable or just rate.

(*d*) What is a reasonable and just rate can only be determined after investigation. It is therefore impracticable to put it *specifically* in issue in advance of an investigation.

4. The Import Case (Texas and Pacific Railway Company v. Interstate Commerce Commission, 162 U. S., 197) recognizes authority in the Commission and courts to prescribe rates.

In the Import Case, in which, as well as in the Social Circle Case, the opinion of this court was prepared by Mr. Justice Shiras and both were handed down at the same time, the

authority of both the Commission and *the courts* to prescribe a rate is expressly recognized.

In that case the inland rate on certain domestic traffic from New Orleans to San Francisco was proven to be 288 cents per 100 pounds. On foreign traffic of the same kind shipped from London or Liverpool via New Orleans to San Francisco, the inland charge by the rail line for the haul from New Orleans to San Francisco was very much less. The Commission ordered that the inland rate on this foreign traffic should not be less than the rate on domestic traffic, to wit, 288 cents per 100 pounds. *This was an order fixing the rate for the time being at 288 cents.*

This court (overruling both courts below) held this order to be invalid, *not on the ground that the Commission had no power to fix a rate*, but because the Commission, in fixing the rate, had refused to consider certain circumstances and conditions which the Supreme Court held to be material.

The court then expressly recognizes this power in the Commission by stating that it "should not have felt inclined to review the *conclusions reached by the Commission or by the courts in respect to what were proper rates to be charged* by the Texas and Pacific Railway Company if the inquiry had been conducted on a proper basis." This appears from the following extract from the opinion:

"We do not refer to these matters for the purpose of indicating what conclusions ought to have been reached by the Commission or by the courts below *in respect to what were proper rates to be charged by the Texas and Pacific Railway Company.* That was a question of fact, and *if the inquiry had been conducted on a proper basis* [*that is, if* all the material circumstances and conditions had been taken into consideration] *we should not have felt inclined to review conclusions so reached.* But we mention them to show that there manifestly was error in excluding facts and circumstances that ought to have been considered." (162 U. S., p. 235.)

The Commission based its order in the Import Case upon the proposition that ocean competition from London and Liverpool to San Francisco could not be considered as creating a dissimilar condition; but the circuit court of appeals placed its affirmance of the Commission's order on a different ground, namely, that the disparity between the inland rates on domestic and import traffic, respectively, was too great to be justified by the ocean competition, even if it could be regarded as creating a dissimilar condition. This court, after adverting to this position of the circuit court of appeals, says:

"This course proceeded, we think, upon an erroneous view of the position of the case; that question was not presented to the consideration of the court. There was no allegation in the Commission's bill or petition that the inland rates charged by the defendant company were unreasonable; *that issue was not presented.* The defendant company was not called upon to make any allegation upon the subject. *No testimony was adduced by either party upon such an issue.*"

Here we have clearly set forth and applied to a decree of the circuit court of appeals the rule laid down in the Social Circle Case and applied to an order of the Commission, that before a rate can be lawfully fixed there must be "an issue made and a finding of the facts."

This court has gone to this extent—no further—and in so holding necessarily finds that on "issue made and a finding of the facts" both Commission *and courts* may prescribe a rate in a given case. If this be not so, why does the court devote a large part of its opinion in the Social Circle Case to a discussion of the grounds upon which the Commission acted in fixing the rate to Atlanta, and in the Import Case to a discussion of the grounds upon which both the Commission and *court* acted in making the inland rate on foreign traffic the same as that on domestic, expressly stating in the latter case that if the Commission and the court below had "conducted

the inquiry on a proper basis we" (the Supreme Court) "should not have felt inclined to review the conclusion reached by the Commission and the courts below *in respect to what were proper rates to be charged by the Texas and Pacific Railway Company?*"

4. *The long and short haul feature of the Social Circle Case.*

There were two subdivisions of the order of the Commission in the Social Circle Case. The one to which we have referred fixing the rate to Atlanta, and the other directing the defendant roads to "cease and desist from charging or receiving any greater compensation in the aggregate for transportation of buggies, etc., for the shorter distance to Social Circle than they charge or receive for transportation of such freight for the longer distance over the same line to Augusta." This court upheld the latter part of the order, and thus affirmed the power of the Commission to make it.

Counsel for the road, however, contends that this part of the order does not "prescribe a maximum rate" to Social Circle, because it names no specific rate. It does direct that the highest or "maximum" rate to Social Circle shall not be in excess of that to Augusta. The rate to Augusta was proven to be then fixed at $1.07 per 100 pounds, and *the witnesses for the roads all testified that this rate could not be raised.* The order, then, *for the time being, prescribed the same rate for Social Circle.*

If the roads, as a compliance with the order of the Commission, had raised the rate to Augusta to $1.37 (the Social Circle rate then in force), the order of the Commission would have attached and held the Social Circle rate at that figure as a maximum. If, instead of raising the Augusta rate, they had reduced the Social Circle rate to $1.07 (the Augusta rate then in force), the order of the Commission would have attached and held

the Augusta rate at not less than that figure. *The order of the Commission attaches to whatever change in rates may be made to either locality, and thereupon fixes the maximum or minimum rate to the other.*

If there be any distinction between such an order and one in terms prescribing a specific maximum rate, *it is not a distinction in principle.*

Four of the *six* subdivisions of the order in the present case, in pursuance of the "long and short haul" rule of section 4 of the law, forbid greater charges to or from Troy, the shorter-distance point, than to or from Montgomery, the longer-distance point, and the power of the Commission to make those orders is therefore expressly recognized by this court in the Social Circle Case.

5. *Claim on the part of carriers that power in the Commission to prescribe rates can not be implied.*

It is contended on the part of the carriers that the power to prescribe reasonable rates is not given to the Commission expressly or *in terms* by the act to regulate commerce, and that it can not be held to be an incidental or implied power, and Judge Sage, in the opinion recently delivered in the case of *The Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railway Company et al.* (Fed. Rep., p. —), holds that it "is not an incidental right" or a "power to be derived by implication," but that "if found at all it must be found in express and specific language, among the powers and rights granted in direct terms," and that "it can not be imported into the act by *reason of the necessities of the case.*"

The mandate of section 1 of the act to regulate commerce in reference to rate charges is *positive* and *affirmative*, that—

"All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * *shall be* reasonable and just."

By section 12 of the act the Commission is "required to execute" this and other provisions of the act.

The power to enforce the positive requirement, that rates "*shall be* reasonable and just," can not be executed, except by ascertaining and prescribing a reasonable and just rate. This can be demonstrated, as follows:

The Commission, it is claimed on the part of the carriers, only has authority to declare an existing rate unreasonable and to order a carrier to cease and desist from exacting that rate. There is always a margin between an unreasonable and a reasonable rate. Suppose the unreasonable rate in force to be *100 cents*, and a reasonable rate to be 80 cents, the margin between the two rates is 20 cents. If the Commission find the rate of 100 cents to be unreasonable and order the carrier to desist from charging it, the carrier will, naturally and properly on the assumption that he is honest in claiming the 100-cent rate to be reasonable, make as slight a deduction as possible. He may make a reduction of 1 cent, leaving a rate of 99 cents, and *this would be a compliance with the order of the Commission.* This would not, however, be the enforcement of the reasonable rate of 80 cents, and would not be an execution of the requirement of the law that rates "*shall be* reasonable and just."

If a new proceeding were instituted before the Commission, the Commission might make the same order as to the 99 cent rate, and the road might again make a reduction of 1 cent as a compliance with that order. This process might be continued until the reasonable rate of 80 cents was reached, but at the present rate of speed in these cases it would consume at least a half century and would amount to an absolute denial of justice. This, too, under a statute which requires "justice" to be administered "*speedily*" in these cases.

It is clear, then, that in order to discharge the duty imposed upon it of executing the requirement that rates "*shall be*

reasonable and just," the Commission must have the power to ascertain and enjoin a reasonable and just rate. But Judge Sage says that this power "can not be imported into the act *by reason of the necessities of the case*." We are at a loss to understand why this is so under a highly remedial statute, and why an exception should in this instance be made from the general rules on the subject.

Those general rules, as laid down by standard authorities, are:

1. "Whenever a power is given by statute everything *necessary* to make it effectual, everything *essential* to the exercise of it, is given by implication." (Endlich on the Interpretation of Statutes, sec. 415.) For example, a statute which authorizes towns to contract debts or other obligations payable in money implies the power to levy taxes to pay them (*Citizens' Savings and Loan Association* v. *Topeka*, 20 Wall., 655), and "the private grant of mines gives the power to dig them." (Endlich, etc., sec. 418.)

2. "Whatever is *necessarily* or logically involved in an enactment is implied by it with the same force as if it were expressed." (Endlich, etc., sec. 421.)

3. "What is implied in a statute is as much a part of it as what is expressed." (Endlich on Interpretation of Statutes, sec. 417; Potter's Dwarris, etc., 115; *Wilson Co.* v. *Third National Bank of Nashville*, 103 U. S., 770.)

6. *The conceded power to declare existing rates unreasonable and to order carriers to desist from charging them, as much an implied power as the power to fix rates.*

It is conceded that the Commission has the power under the interstate-commerce law to declare existing rates unreasonable and to order carriers to desist from charging them, and the Supreme Court in the Social Circle Case (162 U. S., 184) sustained the action of the Commission in directing the defendants, in pursuance of the "long and short haul rule" of section 4 of the law, to make no greater charge for the shorter haul to Social Circle than for the longer haul to Augusta over the same line. *These powers are as much implied powers as the*

power to fix rates. Neither of these powers is given *in terms*, but is implied from the general requirement of section 12 of the law, that the Commission shall execute and enforce its provisions.

If these powers may be implied, why not the authority to prescribe reasonable rates?

The requirement of section 1 is not negative, but affirmative; it is not that *rates shall not be unreasonable*, but that *rates shall be reasonable*.

The language of the "long and short haul rule" of section 4 is not mandatory or imperative, but simply "*that it shall be unlawful*" for a carrier to make a greater charge for a shorter than a longer haul. Section 1, on the other hand, *commands* that rates "*shall be* reasonable."

There is, therefore, greater warrant in the language, as well as spirit of the law, for holding that the Commission has power to prescribe a reasonable rate than there is for holding that it has the power to declare a rate unreasonable or to enjoin a violation of the "long and short haul rule" of the law.

7. *Under sections 13 and 15 of the law, acts of "omission as well as commission" are to be investigated and forbidden by the Interstate Commerce Commission.*

Section 13 of the interstate commerce law provides:

"That any person * * * complaining of anything *done or omitted to be done* by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition," * * * and if "there shall appear to be any reasonable ground for investigating such complaint, it *shall be the duty of the Commission to investigate* the matters complained of. * * *"

Section 15 provides:

"That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission * * * that anything has been *done*

or omitted to be done in violation of the provisions of this act, by any common carrier * * * it shall be the duty of the Commission" to give "notice to said carrier to cease and desist from such violations * * * ."

It is to be noted that in section 13 provision is made for complaints before the Commission of acts of "*omission as well as of commission.*" The language is that complaint may be made "of anything *done or omitted to be done* by any common carrier subject to the act in contravention of its provisions;" and in section 15 that if it appears after investigation of such complaint that "anything has been *done or omitted to be done* in violation of the provisions of the act" it shall be the duty of the Commission to notify the carrier to "cease and desist from such violation"—that is, cease and desist from such act of commission or omission. *Under this authority the Commission may prescribe reasonable rates and order the carrier to put them in force, if it appears that the carrier has omitted to do so.*

8. *Reparation.*—As heretofore stated, by section 15 of the act the Commission is authorized, in case injury is shown to have been sustained by anyone from an unreasonable rate charge or other violation of the law, to issue an order or notice to the carrier "to make reparation" for such injury. This involves the necessity of fixing the amount of the reparation, which in case of excessive rates can only be done by determining what is a reasonable rate, the amount of reparation being the difference between a reasonable rate and the excessive rate exacted.

9. *The act to regulate commerce a remedial statute.*—A general definition of a remedial statute is that "it is a statute giving a party a mode of remedy for a wrong where he had none, or a different one, before." (Potter's Dwarris on Stat. and Con., 73.)

There was a remedy at common law in case of excessive rate

charges in the shape of a suit for damages. This remedy was not deemed adequate, and Congress intended to give an additional and more effective remedy in the act to regulate commerce. Section 22 of that act provides that "nothing in this act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act *are in addition to such remedies.*"

At common law there was no direct mode or remedy for compelling carriers to charge reasonable rates, and the additional remedy in case of excessive rates provided in the act to regulate commerce is found in the command in section 1 that rates "shall be reasonable," and the requirement in section 12 that the Commission shall execute this command.

The act, being remedial, should be liberally construed so as to advance the remedy and suppress the mischief. The contention that the Commission has no power to prescribe reasonable rates, if sustained, will completely nullify the remedy, and the shipper will be in no better condition than he was in at common law.

10. In the act to regulate commerce Congress has at great expense provided for a Commission of five members with a corps of officers and employees, whose sole duty it is to enforce the provisions of that act and investigate questions arising under it.

When a case or proceeding is commenced before this Commission against a carrier for an alleged violation of a provision of the act, it is required that due notice of the charge be served on the carrier, that an opportunity be given to file an answer, and testimony be taken and argument had at a hearing before the Commission as in regular suits before the courts. One of the leading and most important provisions of the act is that rates "shall be reasonable," yet, in a case before the Commission involving the reasonableness of a rate, we are told

the Commission after full investigation and a hearing of all parties in interest has no power to enforce this requirement by prescribing a reasonable rate, although the law positively commands the Commission to enforce it and although the Commission must find what is a reasonable rate in order to award the reparation which the act requires it to award. We are further told that the only function of the Commission in such a case is to declare the particular rate in issue unreasonable and leave the carrier, with that limitation, free to determine what is a reasonable rate.

This is, indeed, an impotent conclusion.

"Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion." (*Lau Ow Bew* v. *United States*, 144 U. S., 47.)

II. The Commission has exercised the power to fix rates from the beginning, and its authority to do so has not until a comparatively recent date been questioned. In the case before the Commission of *Coxe Bros. & Co.* v. *Lehigh Valley Railroad Company* (4 I. C. C. R., 576), counsel *for complainants* stated that he did not ask the Commission to establish any particular rate, but only to declare the existing rate unreasonable. Counsel *for the road*, however, strenuously objected, as follows:

"That will not do. If the Commission says that the present rates are unreasonable, *they must say so because there is a different rate they have determined to be a proper one.* It will not do for you to make a general finding, and to say: 'The present rates are unreasonable, but we do not know what they ought to be. We can not fix them for you. You must agree upon them amongst yourselves.' If unreasonable, say to what extent they are unreasonable: whether to the extent of a cent, or of many cents, or of a dollar a ton. Would it be proper for you to lay down an abstract principle that would lead to endless confusion in the application? That would put all at chaos. For Heaven's sake do not make the matter of the proper rates for carrying coal one to be regulated in a conference between the carrier and the shipper.

"If you have been convinced by these petitions that the present rates are unreasonable and unjust, then say what the rates ought to be. This will be your duty."

Thereupon the Commission said:

"Under such a rule applied to the subject of this complaint five several proceedings would be necessary to establish the reasonable rate, if in each proceeding the carrier deemed a 10 cent reduction sufficient. If, impressed with the belief that the existing rates were not exorbitant, the carrier should attempt compliance with the Commission's conclusion that they were excessive by making the least possible reductions, *repeated and continual applications would be necessary to correct a single abuse.* Certainly Congress intended no such absurdity as this, but, as insisted by counsel for the road, where we have been convinced that rates are unjust, it will be our duty to say what they ought to be, or at least to determine upon some rate any charge in excess of which would be unreasonable. If the duty of the Commission in respect to unjust and unlawful rates ends when it has been convinced that rates are unreasonable, and so decided them to be, and for any reason the Commission may not determine what are as well as what are not reasonable, the regulation provided by the statute begins with complaint and ends in confusion."

In *Perry* v. *Florida Central and Peninsular Railroad Company* (5 I. C. C. R., 110) the Commission say on this subject:

"The act to regulate commerce expressly requires that rates shall be reasonable. The Commission is in terms required to enforce the provisions of the act. In other words, the Commission's power, and consequently its duty, is to enforce reasonable rates. *It is not, of course, contended that the act confers on the Commission the general power to prescribe the traffic charges of carriers subject to its provisions.* The general scope of the act, as well as its specific provisions as to complaints to and investigations and reports by the Commission, forbid such an interpretation. But where complaint is made to the Commission, or a specific inquiry is instituted by it, on its own motion, and it is found after due notice, hearing, and investigation that an existing rate is unreasonable, the Commission is not restricted simply to finding that fact, and forbidding the carrier to charge the existing rate, but it may go further and enforce a reasonable rate; that is, the Commission may in such case, by clear implication from the language of the law, put in force a reasonable rate. Before it can do that it must necessarily determine what the reasonable rate is.

"The power of the Commission to ascertain and declare what is a maximum reasonable rate in case of a complaint charging unreasonableness also results from those provisions of the act requiring the Commission to determine what reparation, if any, should be made by the carrier.

"It has therefore been the unvarying practice of the Commission to fix reasonable rates where, on the hearing of a cause, circumstances seemed to call for such action, or at least to determine the rate any charge in excess of which would be unreasonable."

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and *ought not to be overruled without cogent reasons.*" (*United States* v. *Moore*, 95 U. S., 763; *Heath* v. *Wallace*, 138 U. S., 582; *Pennoyer* v. *McConnaughty*, 140 U. S., 23.)

12. Courts of equity frequently enjoin the charging of more than certain rates by railroads, on the ground that *suits for damages afford inadequate relief* and *to avoid multiplicity of suits.* In controversies between railroad companies and express companies the courts have granted injunctions requiring the railroads to carry express matter at rates designated by the court in the absence of agreement between the parties and until the further order of the court. (*Scofield et al.* v. *Lake Shore & Mich. South. R. R. Co.*, 42 Ohio State Rep., 572; *Express Cos.* v. *Railroad Cos.*, 10 Fed. Rep., 214, 215; *Wells, Fargo & Co.* v. *Or. Ry. & Nav. Co.*, 15 Fed. Rep., 562; *Same* v. *Oregon & C. Ry. Co.*, 18 Fed. Rep., 667, 673; *Dinsmore* v. *L., C. & L. Ry. Co.*, 2 Fed. Rep., 475.)

Under the English statutes the railroad commissioners exercise in fixing through rates a power analogous to that claimed for the Interstate Commerce Commission. (*The Midland Ry. Co.* v. *The Great Western Ry. Co.*, 2 Nev. & Mac. Ry. and Canal Cases, 88, 95, 96, 97, 98; *The Caledonia Ry. Co.* v. *The North Brit. Ry. Co.*, 3 ib., 56, 62; *Great North Ry. Co. of Ireland* v. *The Belfast Ry. Co.*, 3 ib., 411, 418; *Same* v. *Same*, 4 Brown & Mac. Ry. and Canal Cases, 159.)

13. *Cases in Federal circuit courts cited by counsel for the roads, holding that the Commission has no power to prescribe a rate.*

Since the promulgation of the decision of this court in the Social Circle Case, *circuit courts* have in four cases held that the Commission has no power to fix rates, all citing that decision as authority for so holding. Those cases are *Interstate Commerce Commission* v. *Northeastern R. R. Co. of So. Ca. et al.*, in circuit court at Charleston; *Same* v. *Louisville and Nashville R. R. Co.*, in circuit court at Nashville; *Same* v. *Lehigh Valley R. R. Co.*, in circuit court at New York; and *Same* v. *Cincinnati, New Orleans and Texas Pacific Ry. Co.*, in circuit court at Cincinnati.

In the first three cases there is *no discussion whatever of the question*, and the ruling is based solely on the authority of what it is claimed this court holds in the Social Circle Case.

As an example of the summary way in which this vital matter is disposed of, attention is called to the second of these cases (*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*). In this case the court, in what might be termed a postscript, simply says:

"The Social Circle Case denies power in the Commission to fix rates and puts that question at rest."

If, as we have shown, the Social Circle Case does not deny, but expressly recognizes, power in the Commission in a given case, on "issue made and a finding of the facts," to fix a rate, then these cases, being based on a misconstruction of that case, are without any weight whatever as authority on this question.

The last-named case, *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Railroad Company et al.*, decided by Judge Sage as judge of the circuit court at Cincinnati, is the only one in which there is any discussion of

the question of the power to fix rates. In it Judge Sage characterizes the right to fix a rate as "the right to dictate an indispensable and one of the most important terms of the contract between the shipper and the carrier," and expresses the opinion that "it can hardly be said to be within the recognized limits of the exercise of judicial right or power."

Whenever a contract relates to a matter regulated by law (and particularly a public or quasi public matter), the law is an implied term of such contract. The carrier in establishing rates does so subject to the provisions of the interstate-commerce law that those rates "shall be reasonable and just," and that the Interstate Commerce Commission shall enforce their reasonableness.

The carrier in fact dictates the rate to the shipper. It is strictly an *ex parte* proceeding. The shipper has no voice in it. He must accept the rate or not ship his goods. *He is under duress.* There is wanting in the transaction the essential feature of every contract, the "*aggregatio mentium.*"

Moreover, the prohibition in the Federal Constitution of laws "impairing the obligation of contracts" is upon the States and not upon Congress. (*Mitchell* v. *Clark*, 110 U. S., 643.)

XXIII.

THE PRESENT CASE STRONGER THAN THE SOCIAL CIRCLE CASE—NO CASE LIKE THE PRESENT OF ADMITTED DISCRIMINATIONS AGAINST ONE LOCALITY IN FAVOR OF ANOTHER UNDER THE SOUTHERN TRADE-CENTER SYSTEMS OF RATE MAKING HERETOFORE PRESENTED TO THIS COURT.

In conclusion, attention is called to certain essential distinctions between the present case and the Social Circle Case, which make the present case much stronger than the Social Circle Case.

1. Troy is shown and admitted to be a competitive point. Social Circle was a strictly local, noncompetitive point.

2. The complaint in this case was made by Troy merchants and business men, and *injury is shown to have resulted to Troy from the discriminations practiced.* There was no complaint in the Social Circle Case by or in behalf of any consignee at or resident of Social Circle, and no injury to Social Circle was proven.

The fact that Troy is a competitive point and Social Circle a local, noncompetitive point is a material distinction in favor of Troy, *at least from the railroad standpoint.*

In the Import Case stress was laid upon the facts that no "complaint was made by the city of New Orleans or by any person or organization there doing business;" that no "complaint was made by the localities to which the traffic was to be carried," and that it did not appear that any injury had been sustained by those localities; and it was held that the "*welfare of communities occupying localities where the goods are to be delivered*" and of "communities which are in the locality of the place of shipment" is to be considered as well as that of the carriers.

In the discriminations against Troy the welfare of the shipping communities as well as of the people of Troy is disregarded, and the interest of the carrier alone is sought to be subserved.

3. This is the first case before this court in which it is proven that the admitted discriminations are in pursuance of the Southern trade center system of *rate making.*

When the act to regulate commerce was enacted, the greater charge for the shorter than the longer haul over the same line existed only in the South under the Trade Center System of rate making.

Counsel for the roads states in his printed brief in the circuit

court, as heretofore quoted, that "trade centers in the North are so near together that it is impossible to charge higher rates to intermediate local stations than to competitive stations beyond."

The "long and short haul rule" of the fourth section of the act to regul[illegible] commerce was, therefore, aimed at the Southern trade-center system of *rate making*, of which this case presents a striking illustration.

Respectfully submitted.

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